St. John's Law Review

Volume 67
Number 2 *Volume 67, Spring 1993, Number 2*

Article 2

April 2012

Ideology, Due Process and Civil Procedure

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IDEOLOGY, DUE PROCESS AND CIVIL PROCEDURE

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INTRODUCTION

Scholarship in civil procedure traditionally has dealt with the subject as if it were a discrete, essentially apolitical and technical area of the law, largely autonomous from the more overtly political, substantive law. While traditional scholarship regards civil procedure as policy driven, the policies are treated as if they were uniquely or especially procedural.[1]

Civil procedure, however, no less than substantive law, can be intensely ideological. That is, civil procedure doctrine is shaped by the same ideological debates that dominate substantive law. Developments in procedural doctrine thus parallel developments in substantive doctrine because both reflect larger shifts in legal ideology.

This essay is a preliminary examination of the influence of ideology on civil procedure. To keep the inquiry within a manageable scope, I have limited the discussion to two topics which are staples of the standard first year civil procedure course: personal jurisdiction and provisional remedies. These topics are united by the fact that their study in the first year of law school usually emphasizes the limitations that the Due Process Clause places on civil

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[1] *See, e.g.*, GEOFFREY C. HAZARD, JR. & JAN VETTER, PERSPECTIVES ON CIVIL PROCEDURE (1987) (anthology of civil procedure articles); ROBERT M. COVER ET AL., PROCEDURE (1988) (most theoretical of all major civil procedure casebooks).

Nor is this view of civil procedure confined to the academy. One commentator has argued that Burnham v. Superior Court, 495 U.S. 604 (1990), represents the first time in the modern era that the Supreme Court decided a personal jurisdiction case without relying solely on arguments peculiar to procedural law, but "brought into play themes relating more generally to constitutional theory." Earl M. Maltz, *Personal Jurisdiction and Constitutional Theory—A Comment on* Burnham v. Superior Court, 22 RUTGERS L.J. 689, 689 (1991).

procedure doctrine. That has been my focus as well. This essay thus could be characterized as a study of the influence of ideology on the application of the Due Process Clause to civil procedure doctrine.

The discussion is organized principally along historical lines. Part One discusses the late nineteenth century, the era when the Due Process Clause first was applied to personal jurisdiction doctrine. The discussion comprises two sections. The first explicates some of the major themes of the conservative ideology which dominated[2] late nineteenth century legal thought and describes a number of ways in which those themes were reflected in the substantive legal doctrine of that era. The second shows how those same themes also were reflected in *Pennoyer v. Neff*,[3] the landmark 1877 Supreme Court decision holding that the Due Process Clause limits state court exercises of personal jurisdiction.

Part Two discusses the mid-twentieth century and again comprises two sections. The first describes the emergence of a liberal ideology which rejected many of the major themes of late nineteenth century conservatism and which, by the middle of the twentieth century, had become dominant in American legal thought. It also discusses how the rise of mid-twentieth century liberalism was reflected in changes in substantive law. The second section demonstrates that those same themes transformed the doctrine of personal jurisdiction in ways which exactly paralleled developments in the substantive law.

Part Three argues that a resurgence of conservative ideology on the Supreme Court in the last third of the twentieth century has been reflected in all of the major personal jurisdiction cases decided in that period. Using arguments characteristic of their late nineteenth century counterparts, the late twentieth century conservatives have halted and, to some extent, reversed the liberal

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[2] In characterizing each of the ideologies as dominant in a particular period, I am not suggesting that all court decisions of that period were consistent with the dominant ideology. Throughout the period of conservative dominance in the late nineteenth and early twentieth centuries, judges and scholars were engaged in challenging the premises of that ideology and formulating a liberal alternative. Conservatism lost its dominance by a gradual process in which courts increasingly decided cases in a way that was consistent with this newly formulated liberal ideology. By the mid-twentieth century, the liberal ideology was dominant, although some judges and scholars continued to adhere to many of the tenets of late nineteenth century conservatism. For an example of the gradual erosion of conservative ideology, see *infra* note 73 and accompanying text.

[3] 95 U.S. 714 (1877).

transformation of the prior decades.

Part Four analyzes the four most important Supreme Court cases in the area of provisional remedies. All but one were decided in the mid-1970s, at the very time when the ideological character of the Court was shifting from liberal to conservative. It demonstrates that the opinions in these cases reflect the same ideological divisions that characterize the personal jurisdiction cases.

I. LATE NINETEENTH CENTURY CONSERVATIVE IDEOLOGY

A. *Substantive Law*

The conservative political ideology of the late nineteenth century had both a political and a jurisprudential dimension.[4] As will be seen, the two dimensions were mutually reinforcing.[5]

1. The Political Dimension: Deference to the Market

The political dimension was based on the premise that law should protect individual liberties and rights, especially property rights. The primary threat to individual property rights was government regulation. The law thus should be constructed so as to limit government interference with private economic activity.

The corollary was that individual property rights were not threatened by private activity, at least to any degree sufficient to require extensive regulation. Individuals were presumed to be free and equal, in the absence of government intervention, with the result that private activity generally would not coerce or limit the freedom of individuals. Thus, the role of the government was primarily to facilitate rather than to regulate private economic conduct.

Consistent with these premises, late nineteenth century con-

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[4] This discussion of conservative ideology draws on the following works, although the authors may or may not agree with my synthesis: GRANT GILMORE, THE AGES OF AMERICAN LAW 3-62 (1977); ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895 (1960); G. EDWARD WHITE, TORT LAW IN AMERICA (1980); Morton J. Horwitz, *The Rise of Legal Formalism*, 19 AM. J. LEGAL HIST. 251 (1975); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); William E. Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974); Elizabeth Mensch, *The History of Mainstream Legal Thought*, *in* THE POLITICS OF LAW 13 (David Kairys ed., 1990).

[5] *See generally* Kennedy, *supra* note 4.

servatives concluded that the government should defer as much as possible to decisions made by the market. This view was intrinsically conservative, since it essentially ratified the existing distribution of wealth. Property should be redistributed, if at all, by market transactions and not by government regulation. Because market transactions were presumed to be voluntary, market-based redistributions of wealth were not inconsistent with protecting individual freedom.

These political tenets of late nineteenth century conservative ideology were reflected in both private law and public law. As will be seen, courts modified both the common law and constitutional law to insulate private economic activity from government regulation.

a. Private Law: The Requirement of Volition

In private law, the desire to protect individual autonomy from government regulation was reflected in the principle that all liability should be based on some form of volitional conduct by the defendant—whether technically described as intentional conduct, negligence or consent. This principle explains and unifies a number of important changes in the common law during the late nineteenth century.

First, some areas of liability were taken out of tort law and placed in the realm of contract. In *Thomas v. Winchester*,[6] for example, the New York Court of Appeals adopted a widely followed rule that manufacturers were not liable to injured consumers for defective products unless the manufacturer and consumer were in privity of contract. Personal injuries caused by defective products thus were actionable primarily under a theory of contract and not tort.[7]

Contract was the preferred mode of judicial intervention in private affairs because liability was based on relatively overt forms of consent. Indeed, some form of contract law was an essential prerequisite to the functioning of a market. Liability in contract thus

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[6] 6 N.Y. 397 (1852).

[7] *Thomas* did not preclude an action against the manufacturer for fraud. At the time *Thomas* was decided, however, fraud would lie only where the vendor made some affirmative statement with regard to the defect and not for a mere failure to disclose. *See* Mc Donald v. Christie, 42 Barb. 36 (N.Y. App. Div. 1863). Thus, as with contracts, this form of tort liability required a strong volitional act by the defendant. Mere inaction would not suffice.

was not seen as inconsistent with the individualist, pro-market sympathies of conservative ideology.

Second, tort law was entirely reconceptualized so as to base liability on volition.[8] Tort law, which in the early nineteenth century was heavily dominated by strict liability, to the conservatives was a disfavored basis of liability. In contrast to contract, where liability was consensual, liability in tort could be imposed on an individual whose only volitional act was a voluntary muscular contraction, with no inkling that his act could result in liability.

As a reflection of the new emphasis on volition-based liability, a number of torts, such as assault, battery, and trespass, which had been based on strict liability prior to the late nineteenth century, suddenly were reconceived as intentional torts.[9] The state no longer would intervene to redistribute property from the defendant to the plaintiff merely on a showing that the defendant had injured the plaintiff. It was now necessary to show that the defendant had *intended* injury to the plaintiff.

Negligence, which prior to the mid-nineteenth century had meant a failure to perform a duty imposed by law, in effect a form of strict liability, was reconceived as a failure to exercise reasonable care to avoid a foreseeable risk of harm.[10] As in the case of the emergence of intentional torts, the state no longer would intervene to redistribute property from the defendant to the plaintiff upon a showing that the defendant had injured the plaintiff. It now was necessary to show that the defendant had acted unreasonably in the face of a foreseeable risk of harm and thus had acted with a greater degree of volition than had been required under strict liability.[11]

Tort liability generally was not imposed unless the defendant had in some sense willed his liability, by acting either with the intent to harm or with the foreknowledge that harm might occur. Strict liability, which had dominated tort law prior to the late nineteenth century, became a largely residual category of liability, reserved for activities such as the keeping of dangerous animals.[12]

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[8] *See* Kenneth J. Vandevelde, *A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort*, 19 HOFSTRA L. REV. 447, 457-70 (1990).

[9] *Id.* at 450-54, 457-65.

[10] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 85-89 (1977); WHITE, *supra* note 4, at 15.

[11] *See* Vandevelde, *supra* note 8, at 470-71.

[12] *See* WHITE, *supra* note 4, at 108. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 76, at 538-43 (5th ed. 1984).

Third, tort liability, where it did exist, often was undercut by contract principles. That is, tort liability could be limited by consensual conduct. For example, the doctrine of assumption of risk[13] and the fellow servant rule[14] exonerated an employer from liability for injury to his employees on the theory that the employee had consented to the risk of injury by accepting employment. Since private activity was presumed to be free, it was not difficult to portray the acceptance of employment with certain knowable risks as an essentially consensual act.

These various tort and contract rules were directed at effectively subordinating the judicial machinery to private will; that is, liability arose from volitional conduct by the parties. The court's function was to identify the liabilities that the parties had in some sense willed and then to enforce those liabilities.

b. Public Law: Curbing Regulatory Power

In public law, conservative courts sought to protect the primacy of the market by curbing regulatory legislation enacted by populist or progressive legislatures. Beginning in 1873 with the dissents of Justices Stephen Field and Joseph Bradley in the *Slaughter-House Cases*,[15] the Supreme Court developed the doctrine of substantive due process, under which the Due Process Clauses of the Fifth and Fourteenth Amendments were held to prohibit legislation that unreasonably interfered with property or the liberty to contract. In a period reaching roughly from the Court's 1897 decision in *Allgeyer v. Louisiana*[16] to its 1937 decision in *West Coast Hotel v. Parrish*[17] and generally known as the *Lochner* era,[18] the Supreme Court applied the doctrine of substantive due process to invalidate nearly two hundred federal or state statutes.[19]

Substantive due process doctrine required that the courts develop a definition of the liberty or property rights protected against unreasonable interference. For this, they looked to the

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[13] *See, e.g.*, WHITE, *supra* note 4, at 41-45.

[14] WHITE, *supra* note 4, at 51-55.

[15] 83 U.S. (16 Wall.) 36 (1873).

[16] 165 U.S. 578 (1897).

[17] 300 U.S. 379 (1937).

[18] So named after Lochner v. New York, 198 U.S. 45 (1905).

[19] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-2, at 567 n.2 (2d ed. 1988) (identifying 197 state and federal regulatory statutes invalidated by Court between 1899 and 1937). As Professor Tribe points out, an even larger number of statutes survived the Court's scrutiny during this period. *Id.*

common law; that is, the common law provided content to the substantive due process doctrine. The result was a constitutionalization of the common law.[20]

Like the shifts in common-law doctrine described above, the *Lochner* era decisions reflected the belief that private choices made through the market should be given effect. Neither the common law nor legislative enactments should be permitted to interfere with an intent-based system of liability. Contract was the preferred method of redistribution, and legislation that interfered with the scope of contract was void.

Late nineteenth century conservative ideology preferred a court with limited power over the property of individuals, but great power over the legislature. In their dealings with private individuals, courts should be mere facilitators of private choice, not regulators, a role which called for judicial restraint. In their dealings with legislatures, courts should be the vigilant protectors of the prerogative of private choice against regulatory legislation, a role which called for judicial activism.

2. The Jurisprudential Dimension: Formalism

Late nineteenth century conservative ideology had a jurisprudential dimension as well. The jurisprudential dimension conceptualized the law ideally as a system of formal, abstract rules which could be derived from precedent or statute and applied mechanically to decide particular cases—an approach now generally called formalism. Because judging was the mechanical application of known, prior decisions, such a system promised the high degree of predictability necessary for a market to function properly.

The formalists of the late nineteenth century preferred broad, general rules which would govern large categories of cases. Thus, for example, there should be a single law of contract, applicable to all contractual relationships, rather than distinct bodies of law applicable to commercial contracts, labor contracts, consumer contracts, and so forth.[21]

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[20] *Id.* at 562-64.

[21] The formalist belief that the law can be distilled to a few general rules which can be applied mechanically to decide cases was captured in Dean Christopher Columbus Langdell's preface to his 1871 casebook on contract law, in which he wrote:

> Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true

The underlying premise again was that all persons were free and equal, and thus their conduct should be evaluated by the same rules. Free will and equal bargaining power, of course, also are premises that underlie market economics. Thus, the basic assumptions of formalism reinforced the basic assumptions that supported judicial deference to market-based decision-making.

The effect of these broad, general rules was to place human conduct into various large, but sharply-drawn categories. The category into which conduct fell determined the legal consequences of that conduct. The sense that the categories were well-defined contributed to the belief that adjudication could be a mechanical process.

Property rights, for example, were sharply distinguished from personal rights. Property rights were rights over things, while personal rights were rights against other persons.[22] Property rights were to be protected absolutely against infringement, and thus, the simple determination that a right was over a thing led mechanically to the conclusion that it was to be protected absolutely.[23]

B. Civil Procedure

Late nineteenth century conservatism was reflected not only in substantive law, but in civil procedure as well. The Supreme Court constructed a modern law of personal jurisdiction around the two basic principles of conservative private and public law doctrine.

Borrowing from private law doctrine, the Supreme Court took the principle that *jurisdiction*, like *liability*, should be based on the volitional conduct of the defendant. From public law doctrine, the Supreme Court took the principle that the Due Process Clause limits state regulatory power. These principles reconceptualized

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> lawyer. . . . Moreover, the number of fundamental legal doctrines is much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance . . . being the cause of much apprehension. If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number.

CHRISTOPHER C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS viii (1871).

[22] *See* Kenneth J. Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 331-32 (1980). The sharp distinction was reflected, for example, in the rule that equity would act to protect property rights, but not personal rights. *Id.* at 334.

[23] *Id.* at 328-30.

the law of personal jurisdiction.

The law of personal jurisdiction formulated by the Supreme Court in the late nineteenth century also reflected the jurisprudential dimension of the conservative ideology of that era. As will be seen, the law of personal jurisdiction was a structure of rigid categories and formal, abstract rules.

Thus, from the beginning, conservative jurisdictional doctrine had three essential elements: (1) the requirement of volitional conduct; (2) the use of the Due Process Clause to limit power; and (3) a formalist system of rigid rules.

The pivotal case in the construction of a conservative law of personal jurisdiction was *Pennoyer v. Neff*,[24] in which the Supreme Court declared that the Due Process Clause imposed territorial limitations on the personal jurisdiction of state courts. In *Pennoyer*, an attorney named John Mitchell had filed suit in Oregon against his former client Marcus Neff for an unpaid fee of less than $300.[25] At the time the suit was filed, Neff was not a resident of Oregon, and he was never personally served with process.[26] Mitchell won a default judgment, which was satisfied by an execution against certain land owned by Neff.[27] As a result of the execution and sale of the land, title was acquired by Sylvester Pennoyer. When Neff returned to Oregon, he filed an action against Pennoyer to recover possession.[28]

The case turned on the question whether the judgment against Neff was valid. The Supreme Court held in an opinion by Justice Stephen Field that the judgment was not valid.[29]

The Court's discussion articulated a fundamental distinction between two types of personal jurisdiction: *in rem* and *in personam* jurisdiction. In an *in rem* (or *quasi in rem*) action, the court essentially exercises jurisdiction over property located in the territory of the sovereign, whereas in an *in personam* action the court exercises jurisdiction over the person of the defendant.[30]

A court obtains *in rem* jurisdiction by issuing an order attach-

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[24] 95 U.S. 714 (1877).

[25] *Id.* at 719.

[26] *Id.* at 719-20.

[27] *Id.* at 719.

[28] *Id.*

[29] *Pennoyer*, 95 U.S. at 734.

[30] *Id.* at 724-26. The Court used the term *in rem* to refer collectively to *in rem* and *quasi in rem* jurisdiction.

ing the property.[31] In *Pennoyer*, however, the action against Neff had been brought before he obtained title to the land, and thus, the land had not been attached prior to judgment. For that reason, the court had no jurisdiction *in rem*.[32]

Turning to *in personam* jurisdiction, the Court explained that international law traditionally refused to recognize the validity of a judgment rendered in one state against a citizen of another when the defendant had not been served with process or voluntarily appeared.[33] Thus, under international law, a court had jurisdiction over the person of the defendant only if the defendant was a resident of the state, consented to jurisdiction, or was served personally while in the territory of the state. Since none of these conditions had been met, the Oregon court had no jurisdiction over Neff, and accordingly the judgment against him was void.[34]

That analysis alone could have decided the case. The Court went further, however, and held that the exercise of jurisdiction over a defendant except in accordance with these traditional principles would violate the Due Process Clause.[35] The Due Process Clause, in other words, limited the power of courts to intervene in private affairs and redistribute wealth from the defendant to the plaintiff.

The entire discussion of the Due Process Clause technically was *dictum*. The Fourteenth Amendment had not been ratified at the time the trial court assumed jurisdiction over Neff and thus could not have imposed any limitations on the court's exercise of power.

Justice Field's use of the Due Process Clause, however, constructed a law of personal jurisdiction that was structurally parallel to the substantive due process doctrine, that he had begun to introduce into American public law only four years before in the *Slaughter-House Cases*.[36] In Justice Field's law of personal jurisdiction, as in his public law, the Due Process Clause was a primary source of limitations on state power to regulate private economic activity. Further, just as he would do in the area of substantive due process, Justice Field in the area of personal jurisdiction looked to

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[31] *Id.* at 727-28.
[32] *Id.* at 728.
[33] *Id.* at 729.
[34] *Pennoyer*, 95 U.S. at 732-34.
[35] *Id.* at 733.
[36] 83 U.S. (16 Wall.) 36 (1873).

the common law to provide the content of the limitations imposed on state power by the Due Process Clause.

Thus, the limitation on judicial power imposed by the Due Process Clause under *Pennoyer* was consistent with the basic principle of conservative private law doctrine. Specifically, power could be exercised only in three situations, all of which were within the control of the defendant: where the defendant had become a citizen of the jurisdiction, had appeared physically in the jurisdiction at the time of service, or had consented to jurisdiction. Since all three situations involved volitional conduct by the defendant, the defendant would be subject to judicial power only if he allowed himself to be. Jurisdiction, in other words, was based on the volitional conduct of the defendant. The power of the courts, in effect, was subordinate to the will of the defendant.

Neff had been served by publication in accordance with state law.[37] This was insufficient, however, to confer jurisdiction. *Pennoyer* thus imposed due process limitations on the power of the legislature as well. No legislature could authorize the courts to exercise power over individuals except in accordance with the volition-based theories of jurisdiction—citizenship, presence, or consent.

The law of personal jurisdiction developed by late nineteenth century conservatives merged elements drawn from conservative doctrine in both public and private law. Personal jurisdiction doctrine took from public law its essential structure: the use of the Due Process Clause to limit the exercise of state power. Personal jurisdiction doctrine took from private law its essential content: the exercise of state power only where the defendant had engaged in some form of volitional conduct. Thus, state power was subordinated to private will.[38]

The law of personal jurisdiction articulated in *Pennoyer* also was consistent with the formalist ideology of late nineteenth century conservatives. The sharp distinction between *in rem* and *in personam* jurisdiction mirrored the sharp distinction between property and personal rights. It reflected the formalist preference for rigid categories into which events could be placed, thereby determining their legal consequences.

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[37] *Pennoyer*, 95 U.S. at 720.

[38] *See* Roger H. Transgrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 894 (1989) (arguing that principle of consent "unites and justifies" the bases of jurisdiction approved by *Pennoyer* as well as *International Shoe*).

The formalist preference for abstract, general rules was reflected in the rules governing *in rem* and *in personam* jurisdiction. *In rem* jurisdiction was based on presence of property in the territory, while *in personam* jurisdiction was based on presence, residence, or consent. Neither rule seemed to require detailed, fact-specific determinations. Both rules were stated at a high level of generality and seemed to determine large numbers of cases in a relatively mechanical way.

II. MID-TWENTIETH CENTURY LIBERAL IDEOLOGY

A. *Substantive Law*

The liberal ideology of the mid-twentieth century developed to a very great extent as a reaction against late nineteenth century conservatism.[39] Conservatism, of course, never commanded universal acceptance on the part of American courts or lawyers. Even at its most potent moment, there were dissenting voices challenging both the political and the jurisprudential dimensions of conservative ideology. For example, the doctrine of substantive due process did not command a majority of the Court until the turn of the century, more than twenty years after the decision in the *Slaughter-House Cases*.[40] The most famous of the substantive due process cases, *Lochner v. New York*,[41] was also the occasion for one of the best known critiques of substantive due process—Justice Holmes' dissent in that same case.[42]

1. The Political Dimension: Market Regulation

In the political dimension of ideology, mid-twentieth century liberalism disputed the conservative assumption that the principal threat to individual economic freedom was government intervention in private affairs. Liberals did not regard all individuals as free and equal in their relations with each other. Rather, they be-

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[39] The following discussion of liberal ideology draws on the following works, although the authors may or may not agree with my synthesis: GILMORE, *supra* note 4; EDWARD PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY (1973); WHITE, *supra* note 4; Kennedy, *supra* note 4; Mensch, *supra* note 4; G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Twentieth Century America*, 58 VA. L. REV. 999 (1972).

[40] *See supra* notes 15-19 and accompanying text.

[41] 198 U.S. 45 (1905).

[42] *Id.* at 74 (Holmes, J., dissenting).

lieved that civil society was characterized by hierarchies based on wealth which permitted some individuals to dominate others. Private domination rather than government tyranny was the more immediate threat to freedom.

The protection of individual rights, therefore, necessitated government regulation of private economic activity to protect the weak from the strong. The courts and legislature should not reflexively defer to the market, but should scrutinize and regulate market-based decisions to ensure that individuals were adequately protected against exploitation.

These political tenets of mid-twentieth century liberal ideology transformed both private law and public law. As will be seen, courts modified the common law as well as constitutional law in ways which permitted greater government regulation of private economic activity.

a. Private Law: De-emphasizing Volition

In private law, courts moved away from the principle that liability should be based on the volitional conduct of the defendant. Each of the trends in contract and tort law which had characterized late nineteenth century private law was reversed to some extent in the mid-twentieth century.

First, some forms of liability were moved from the realm of contract to the realm of tort. Beginning with *MacPherson v. Buick Motor Co.*,[43] for example, courts held that a consumer could sue a manufacturer for negligence, even though they were not in privity of contract. Put another way, products liability could arise in tort as well as contract. Similarly, courts began to impose tort liability for intentional interference with prospective advantage[44] and thus to protect expectancies under the rubric of tort in addition to that of contract. Contract law, in other words, no longer was the preferred mode of judicial intervention in private affairs. Courts increasingly addressed problems of liability for injury from the more paternalistic and regulatory perspective of tort law.

Second, within tort law, the courts resurrected strict liability. Beginning with *Greenman v. Yuba Power Products, Inc.*,[45] courts

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[43] 111 N.E. 1050, 1054 (N.Y. 1916).

[44] *See* KEETON ET AL., *supra* note 12, at 1005-12 (§ 130 - Interference with Prospective Advantage).

[45] 377 P.2d 897 (Cal. 1963).

held sellers strictly liable to persons injured by defects in their products. Courts also began to impose strict liability on those who caused physical injury by engaging in abnormally dangerous activities.[46] Although each of these theories of liability applied only where an injury was caused by the defendant's volitional act, the level of intent was attenuated and remote in time from the injury. All that was necessary for liability was for the defendant to have voluntarily sold the product or engaged in the abnormally dangerous activity.

Third, courts were less willing to permit parties to subordinate tort duties to contract. Courts began, for example, to limit the assumption of risk doctrine as well as the fellow servant rule.[47] Because courts now were more conscious of hierarchy and domination in the private sphere, they were unwilling to characterize the decision to accept hazardous employment as a voluntary contract between employer and employee.

Indeed, in a stark reversal of the trend which had transformed private law in the nineteenth century, tort law began to infiltrate the realm of contract. Courts interjected tort-like doctrines based on public policy or fairness, such as promissory estoppel, into contract law.[48] The "contractualization" of tort law, which had characterized the nineteenth century, gave way to the "tortification" of contract law in the mid-twentieth century.

Private law rules now were shaped by the state's regulatory interests, which might require the imposition of liability despite the fact that the defendant had acted with only the most attenuated form of volition. This shift was reflected not only in the contract and tort rules discussed above, but in property law as well. By the early twentieth century, courts and commentators had begun to acknowledge that property rights were not rooted in any kind of individualist conception of natural law, but were creations of a positive, regulatory state.[49]

The judicial machinery was no longer so readily subordinated

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[46] *See, e.g.*, Exner v. Sherman Power Constr. Co., 54 F.2d 510, 514 (2d Cir. 1931) (explaining abnormally dangerous activities doctrine and policy); Pacific Northwest Bell Tel. Co. v. Port of Seattle, 491 P.2d 1037, 1039-40 (Wash. 1971) (explaining strict liability for abnormally dangerous activities).

[47] *See generally* KEETON ET AL., *supra* note 12, at 493-95, 571-72 (§ 68 - Assumption of Risk and Employers' Liability).

[48] *See generally* GRANT GILMORE, THE DEATH OF CONTRACT (1974) (tracing separation of contract law from tort law and subsequent reabsorption).

[49] *See* Vandevelde, *supra* note 22, at 363-66.

to private will. The state would not defer instinctively to market-based arrangements, but would scrutinize and regulate private economic activity.

b. *Public Law: Deference to Economic Regulation*

In public law, liberal ideology called for judicial restraint in reviewing the constitutionality of economic regulation enacted by the legislature. In *West Coast Hotel v. Parrish*,[50] decided in 1937, the Supreme Court upheld minimum wage legislation, explicitly overruling a prior *Lochner* era decision.[51] Other major *Lochner* era decisions were overruled during the next few years.[52] Finally, in 1955 the Supreme Court held, in *Williamson v. Lee Optical Corp.*,[53] that economic regulation would be upheld based on mere supposition about what the legislature might have believed was the rationale for the legislation. By this time, the Supreme Court's deference to legislative judgment in the area of economic regulation was almost total.

Like the changes in common-law doctrine described above, the post-*Lochner* era decisions reflected the belief that the market needed regulation. Neither the common law nor legislative enactments should be subordinated to private will, nor should the courts defer to a volition-based system of liability. The courts would, and the legislatures could, intervene in private contractual arrangements to allocate liability as public policy or fairness required.

Thus, in the area of economic regulation, mid-twentieth century liberal ideology preferred a court that would itself aggressively regulate private economic activity, while also deferring to legislative economic regulations. In their dealings with private individuals, courts should be regulators, not deferential ratifiers, of private choice—a role which called for judicial activism. In their dealings with the legislature on economic matters, courts should defer to legislative judgment—a role which called for judicial restraint.

As the twentieth century reached its third decade, the Supreme Court began to hear more cases involving challenges to state regulation of speech, particularly in the form of prohibitions on the

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[50] 300 U.S. 379 (1937).

[51] *Id.* at 400; Adkins v. Children's Hosp., 261 U.S. 525 (1923), *overruled by* West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

[52] *See, e.g.*, Phelps Dodge v. NLRB, 313 U.S. 177, 182-83 (1941) (referring to Adair v. United States, 208 U.S. 161 (1908) and Coppage v. Kansas, 236 U.S. 1 (1915)).

[53] 348 U.S. 483 (1955).

advocacy of lawless action. In those cases, prominent liberals on the Court, particularly Justices Oliver Wendell Holmes and Louis Brandeis, made it clear that their deference to legislative regulation did not extend beyond the area of economic regulation. Consequently, Justices Holmes and Brandeis dissented from Supreme Court decisions upholding the conviction of communists and socialists under various espionage, criminal anarchy, and criminal syndicalism statutes.[54]

Liberal ideology did not perceive speech as an area in which private domination was to be feared. Indeed, at the very time that liberals were calling for increased regulation of the market, Justice Holmes was defending "free trade in ideas" on the theory that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[55] Individual freedom required regulation of the economic market, but unregulated commerce in the marketplace of ideas.

Liberal support for protecting individual rights against state regulation extended beyond free speech. In 1938, only a year after the Supreme Court ended the *Lochner* era, Chief Justice Harlan Stone laid a cornerstone of mid-twentieth century liberal ideology. He suggested in *United States v. Carolene Products Co.*[56] that, while the court normally should defer to legislative judgments, legislation affecting certain noneconomic rights, particularly those specifically protected by the Bill of Rights, might be "subjected to more exacting judicial scrutiny."[57] Thus, the Court strictly scrutinized legislative restrictions on noneconomic rights such as free speech[58] and privacy.[59] Liberals deferred to legislative regulation of economic rights, but opposed legislative restrictions on many noneconomic rights.[60]

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[54] *See* Gitlow v. New York, 268 U.S. 652, 672-73 (1925) (Holmes & Brandeis, JJ., dissenting); Pierce v. United States, 252 U.S. 239, 253-73 (1920) (Holmes & Brandeis, JJ., dissenting); Abrams v. United States, 250 U.S. 616, 624-31 (1919) (Holmes & Brandeis, JJ., dissenting). Justices Holmes and Brandeis did not always dissent. *See* Whitney v. California, 274 U.S. 357, 372-80 (1927) (Holmes & Brandeis, JJ., concurring), *overruled by* Brandenberg v. Ohio, 395 U.S. 444 (1969); Schenk v. United States, 249 U.S. 47, 52-53 (1919).

[55] *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

[56] 304 U.S. 144 (1938).

[57] *Id.* at 152-53 n.4.

[58] *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 406 (1989) ("[A] law directed at speech itself, [must] be justified by the substantial showing of need that the First Amendment requires.").

[59] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973).

[60] *See generally* TRIBE, *supra* note 19, at 769-72.

2. The Jurisprudential Dimension: Realism

Liberal ideology also rejected the jurisprudential dimension of late nineteenth century conservatism. Liberals, now led by a movement known as Legal Realism,[61] did not believe that rules could be mechanically applied to particular facts to yield a single, inevitable result. Rather, cases could be decided only by reference to underlying policies. That is, the decision in a particular case represented a choice by the court among competing policies, not the neutral application of a rule.

Similarly, liberals rejected the scheme of rigid categories that had typified late nineteenth century conservative jurisprudence. The mid-twentieth century witnessed, for example, the collapse of the distinction between property rights and personal rights.[62] This collapse resulted from the realization that property rights were not rights over things, but rights against other persons. This realization culminated with the work of Wesley Newcomb Hohfeld, who had argued that any given instance of property could be characterized as consisting of one or more "jural relations" between persons—such as a right, privilege, power, or immunity.[63] Such terms, of course, were equally applicable to jural relations between persons not involving any kind of thing. Any right could be characterized either as a property right or as a personal right.

Liberal skepticism about rules was reinforced by a recognition of inequality and domination in the private sector. Liberals believed that inequalities in bargaining power rendered it unfair to apply the same rules in the same way to large numbers of relationships. For example, consumer contracts might be governed by rules different than those which applied to contracts between merchants.[64]

The greatly reduced importance of volitional conduct as a ba-

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[61] *See* Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 438-54 (1930).

[62] *See* Vandevelde, *supra* note 22, at 357-66.

[63] *See* Wesley N. Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917); Wesley N. Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28-32 (1913).

[64] The Uniform Commercial Code, for example, which was drafted by Karl Llewellyn, among the best known of the Legal Realists, distinguished between contracts between merchants and other contracts. *See, e.g.*, U.C.C. § 2-201(2) (1990) (separate statute of frauds for contracts between merchants); § 2-205 (special provision for firm offers by merchants); § 2-209(2) (special provision for contract modifications between merchants); § 2-314 (implied warranty of merchantability in sales by merchants).

sis for liability in liberal ideology was consistent with the liberals' view that many bargaining relationships were characterized by varying degrees of hierarchy. To the extent that free will is compromised by those with greater bargaining power, the use of volitional conduct as the principal basis of liability made little sense. Doubts about the voluntariness of contractual relationships reinforced the liberals' reluctance to defer to the market as a mechanism for decision-making.

Because of their skepticism about the possibility or the fairness of mechanically applying broad, general rules, liberals often preferred that legal principles be embodied in flexible standards, such as "reasonableness" or "good faith."[65] These relatively vague standards would permit a court to decide cases in a way that took into account the relative position of the parties and furthered the regulatory goals of the state.

B. Civil Procedure

Just as late nineteenth century conservatism had reconceptualized the rules of jurisdiction in *Pennoyer* to parallel rules of liability, mid-twentieth century liberalism transformed the *Pennoyer* doctrine to mirror mid-twentieth century changes in substantive law. Liberals borrowed from both public and private law doctrine to create a liberal doctrine of personal jurisdiction.

Borrowing from private law, liberals adopted the principle that jurisdiction, like liability, should be based on the regulatory needs of the state. From public law, liberals took the principle that the Due Process Clause imposes only a very weak restraint on state regulatory power.

The liberal personal jurisdiction doctrine of the mid-twentieth century also reflected the jurisprudential dimension of the liberal ideology of that era. Liberals abandoned the rigid categories of formalism in favor of a more flexible standard which created jurisdiction where to do so was fair and reasonable under the

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[65] These terms, for example, are important concepts in Karl Llewellyn's Uniform Commercial Code. *See, e.g.*, U.C.C. § 1-102(3) (obligations of good faith and reasonableness prescribed by Code may not be disclaimed, although parties may determine by agreement standards by which performance of such obligations is to be measured if standards are not manifestly unreasonable); § 1-201(19) (defining "good faith"); § 1-203 (imposing obligation of good faith in contracts); § 2-306(1) (terms of output and requirements contracts set by standards of good faith and reasonableness); § 2-309 (allowing reasonable time for performance).

circumstances.

From the beginning, the liberal doctrine of personal jurisdiction had three elements: (1) jurisdiction based on the state's regulatory interests, with little or no volitional conduct required; (2) the expansion of state court personal jurisdiction by weakening the limitations imposed by the Due Process Clause; and (3) the use of flexible standards. Thus, all three tenets of the conservative doctrine of personal jurisdiction were in some measure rejected.

1. *International Shoe*

The liberal transformation of personal jurisdiction doctrine began with *International Shoe Co. v. Washington*,[66] decided in 1945. The State of Washington instituted an action against the International Shoe Company, a Delaware corporation, to collect unpaid contributions to the state unemployment compensation fund.[67] International Shoe had no corporate offices in Washington, but did employ salesmen to solicit and take orders within the state.[68] Service was made upon one such salesman.[69]

The issue before the Supreme Court was whether the state court had personal jurisdiction over International Shoe. Because International Shoe was a Delaware corporation, residence did not provide a basis. The Court might have concluded, as it had in other situations,[70] that International Shoe's activities were sufficient to constitute presence within the state and that jurisdiction was thus consistent with the *Pennoyer* triad.

The Court chose instead to reconceptualize the limitations imposed by the Due Process Clause on the personal jurisdiction of state courts. The Court held that the Due Process Clause required only that the defendant "have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[71] The Court noted that the criteria for determining whether the test was

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[66] 326 U.S. 310 (1945).

[67] *Id.* at 311.

[68] *Id.* at 313.

[69] *Id.* at 312.

[70] *See, e.g.*, International Harvester Co. v. Kentucky, 234 U.S. 579, 589 (1914); St. Louis S.W.R. Co. v. Alexander, 227 U.S. 218, 247-48 (1913).

[71] *International Shoe*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

met "cannot be simply mechanical or quantitative."[72]

International Shoe represented both a jurisprudential and a political transformation of the Due Process Clause as it applied to personal jurisdiction. The jurisprudential transformation is the more obvious: Consistent with liberalism's proclivity to use standards in place of rules, the Court in *International Shoe* moved from the rigid *Pennoyer* rule to a more flexible minimum contacts standard.[73] *International Shoe* was a rejection of formalism in the law of personal jurisdiction.

The political transformation had two elements, each of which reversed one of the accomplishments of *Pennoyer*. First, whereas *Pennoyer* had established the Due Process Clause as a limitation on jurisdiction,[74] *International Shoe* weakened the Due Process Clause by permitting the exercise of jurisdiction where none of the *Pennoyer*-approved bases existed.[75] The weakening of the Due Process Clause as a restriction on jurisdiction in *International Shoe* paralleled the weakening of the Due Process Clause as a restriction on substantive legislation in *West Coast Hotel Co. v. Parrish*.[76]

Second, whereas *Pennoyer* had based constitutionally proper jurisdiction on the defendant's volitional conduct, *International Shoe* based jurisdiction on "contacts," without necessarily requiring contacts that were volitional on the defendant's part. All that was necessary was that jurisdiction be fair and just in light of the contacts. *International Shoe* thus moved away from *Pennoyer* by suggesting the possibility of jurisdiction based on something other

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[72] *Id.* at 319.

[73] The shift from *Pennoyer* to *International Shoe* was not effected in a single step. As noted above, decades before *International Shoe* was decided, courts had begun to find that nonresident corporations had a kind of fictitious presence in the forum state as a result of their activities in the state. Similarly, the courts also had upheld state statutes which conferred personal jurisdiction over nonresidents based on the fiction that the nonresident had impliedly consented to jurisdiction by engaging in certain specified conduct, such as driving an automobile in the forum state. *See* Philip B. Kurland, *The Supreme Court, the Due Process Clause and the* In Personam *Jurisdiction of State Courts—From* Pennoyer *to* Denckla*: A Review*, 25 U. CHI. L. REV. 569, 578-82 (1958).

Thus, the abandonment of the rigid *Pennoyer* rule had occurred in two stages. The first was to retain the rule in form, but to interpret presence and consent very broadly. The second was to hold in *International Shoe* that adherence to the *Pennoyer* rule, even in form, no longer was necessary, and that satisfaction of the more flexible standard of minimum contacts would suffice. *See International Shoe*, 326 U.S. at 316.

[74] *Pennoyer*, 95 U.S. at 733.

[75] *International Shoe*, 326 U.S. at 316.

[76] 300 U.S. 379 (1937).

than a volitional act by the defendant, without explicitly approving such an exercise of jurisdiction. The apparent de-emphasis on the defendant's volition as a basis for jurisdiction in *International Shoe* paralleled the de-emphasis on volition as a basis for liability in mid-twentieth century private law.

Both of these elements of the political transformation were reaffirmed five years later in the first two Supreme Court cases to apply the *International Shoe* doctrine. The extent to which *International Shoe* had unleashed state jurisdictional power by weakening the Due Process Clause was demonstrated by *Travelers Health Ass'n v. Virginia*,[77] while the diminished importance of the defendant's volitional conduct was shown by *Mullane v. Central Hanover Bank & Trust Co.*[78]

In *Travelers Health*, the defendant was a membership association incorporated in Nebraska which conducted a mail order health insurance business in Virginia, the forum state.[79] Unlike the International Shoe Company, it had no paid agents.[80] Rather, its new members generally were obtained through recommendations from existing members.[81] Once a prospect was identified, he was sent a blank application form which was to be filled out and returned to the home office in Omaha.[82]

In resisting the jurisdiction of the Virginia courts, Travelers cited a pre-*International Shoe* decision, *Minnesota Commercial Men's Ass'n v. Benn*,[83] in which the Supreme Court had held that a Minnesota association, which obtained members in Montana by the same mail solicitation process as used by Travelers to obtain Virginia members, was not subject to the jurisdiction of the Montana courts. The Minnesota association's activities in Montana simply were not sufficient to support the fiction that it met the consent or presence criteria of *Pennoyer*.[84]

The Court held, however, that Travelers was subject to the jurisdiction of the Virginia courts.[85] It rejected the "narrow grounds"

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[77] 339 U.S. 643 (1950).

[78] 339 U.S. 306 (1950).

[79] *Travelers*, 339 U.S. at 645-46.

[80] *Id.* at 646.

[81] *Id.*

[82] *Id.*

[83] 261 U.S. 140 (1923).

[84] *Travelers*, 339 U.S. at 647.

[85] *Id.* at 649.

of the *Benn* case as no longer controlling[86] and concluded that the minimum contacts standard of *International Shoe* was met. The clear message was that the minimum contacts standard would permit state courts to exercise power over defendants who had been beyond the reach of courts under the *Pennoyer* rule. The Court had effectively weakened the Due Process Clause as a limitation on state court jurisdiction.

Mullane was an action filed in New York state court by the Central Hanover Bank and Trust Company to obtain a judicial settlement of accounts with respect to a common trust fund it was administering as trustee.[87] The decree sought would have the effect of conclusively extinguishing claims that the beneficiaries might have had against Central Hanover growing out of the latter's management of the fund.[88] Some of the beneficiaries clearly were not residents of the State of New York.[89] Other beneficiaries could not even be identified by name.[90] The court appointed Mullane as guardian and attorney for "all persons known or unknown not otherwise appearing who had or might thereafter have any interest in the income of the common trust fund."[91] Mullane objected that the court had no personal jurisdiction over those beneficiaries who were nonresidents of New York.[92]

The Supreme Court held that New York did have jurisdiction over all beneficiaries.[93] It explained that "the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident."[94]

Not a word was said about the conduct of the beneficiaries. Jurisdiction was not based on any form of volitional conduct by the beneficiaries—indeed, some beneficiaries were not as yet even identified. Rather, jurisdiction existed because of the state's inter-

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[86] *Id.* at 647.

[87] *Mullane*, 339 U.S. at 307-09.

[88] *Id.* at 311.

[89] *Id.* at 309.

[90] *Id.* at 317.

[91] *Id.* at 310.

[92] *Mullane*, 339 U.S. at 311. Mullane also argued that some beneficiaries had been given inadequate notice, a contention with which the Court agreed in part. *Id.* at 311-19.

[93] *Id.* at 313.

[94] *Id.*

est in regulating trusts created under its laws.[95]

2. The Early Struggle for the Soul of *International Shoe*

a. McGee v. International Life Insurance Co.

The liberal transformation of personal jurisdiction reached its apotheosis in 1957 with the Supreme Court's decision in *McGee v. International Life Insurance Co.*[96] In *McGee*, the beneficiary of a life insurance policy filed suit in California state court against a nonresident insurance company for payment of insurance proceeds.[97] The defendant had no office or agent in California and, insofar as the record showed, had never solicited or conducted any insurance business in California apart from the single policy involved in the case.[98] The defendant had issued that single policy only as a result of an agreement with another insurance company to take over the latter's obligations.[99] Following the agreement, the defendant had offered to cover the insured in accordance with the terms of the original policy, an offer which the insured accepted.[100] Although the only contact between the defendant and California was the single insurance policy, the Court upheld California's jurisdiction over the defendant.[101]

The Court's opinion in *McGee*, written by Justice Black and announced by Justice Douglas, for the first time openly acknowledged that there had been a "clearly discernable [trend] toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents."[102] The Court, also for the first time, supplied the underlying reason for this trend. "In part, [it was] attributable to the fundamental transformation of our national economy over the years."[103] That is, many commercial trans-

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[95] *Id.* Because the action involved land situated in the forum, Mullane apparently argued that the case was governed by *Pennoyer*. *Id.* at 311. The Court, however, rejected this argument as well. After observing that the action resembled, in different ways, both *in rem* and *in personam* actions, the Court stated that Fourteenth Amendment standards would not turn on the "technical definition" of the action under state law. *Id.*

[96] 355 U.S. 220 (1957).

[97] *Id.* at 221-22.

[98] *Id.* at 222.

[99] *Id.* at 221-22.

[100] *Id.*

[101] *McGee*, 355 U.S. at 223.

[102] *Id.* at 222.

[103] *Id.*

actions now touched more than one state and involved parties on opposite coasts. "At the same time," the Court continued, "modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."[104]

McGee thus reaffirmed both of the elements of the political dimension to the liberal transformation of the Due Process Clause in personal jurisdiction cases. First, the Court acknowledged that it was very consciously expanding the jurisdiction of the courts over nonresidents engaged in economic activity. Second, the expansion was giving rise to new jurisdictional rules limited only by the scope of the state's regulatory interests and not by the scope of the defendant's volitional conduct. As the Court explained, "It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims."[105] That is, the expansion of power was directly tied to the role of the state in regulating market activity to protect consumers.

b. Hanson v. Denckla

The very same term, however, the Court handed down a decision in *Hanson v. Denckla*,[106] which planted the seeds for a resurgence of conservative ideology in the area of personal jurisdiction. Thus began a struggle for the soul of *International Shoe* which has continued to the present.

In *Hanson*, a trust had been established in Delaware by a Pennsylvania settlor who later changed her domicile to Florida.[107] Upon the settlor's death, a dispute arose as to whether the property passed to the legatees under the settlor's will or to the beneficiaries of an *inter vivos* power of appointment exercised by the settlor.[108] Some of the legatees brought an action for a declaratory judgment in Florida, naming as defendants the beneficiaries of the appointment and the Delaware trustee.[109] The question before the Supreme Court was whether the Florida courts had personal jurisdiction over the Delaware trustee.[110]

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[104] *Id.* at 223.
[105] *Id.*
[106] 357 U.S. 235 (1958).
[107] *Id.* at 238-39.
[108] *Id.*
[109] *Id.* at 240-41.
[110] *Id.* at 243.

For the first time since *International Shoe*, the Court found, in a 5-4 decision, that a state's exercise of personal jurisdiction had violated the Due Process Clause.[111] Chief Justice Warren's opinion for the majority challenged each of the three elements of the liberal transformation of the Due Process Clause.

First, the majority challenged the great expansion of personal jurisdiction that had followed on the heels of *International Shoe*. Chief Justice Warren began his analysis by paraphrasing the language in *McGee* that had noted the trend of expanding personal jurisdiction over nonresidents.[112] "But," the Chief Justice wrote as he drew the line in the dust, "it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts."[113]

Second, the majority sought to reformulate due process doctrine so as to base jurisdiction on the defendant's volitional conduct rather than on the state's regulatory interests. The Chief Justice announced a new test which must be satisfied for the *International Shoe* standard to be met: "[I]t is essential in each case," he wrote, "that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[114]

The new test required a *purposeful* availment of the forum state's laws by the defendant. Thus, "unilateral activity" by those "who claim some relationship" with the defendant could not satisfy the requirements of *International Shoe*.[115] Only the defendant's own purposeful affiliation with the state could subject it to the power of the state's courts.

The purposeful availment test not only reintroduced the defendant's volitional conduct as the basis of jurisdiction, but also provided a mechanism for preventing the continued expansion of personal jurisdiction. Applying the purposeful availment rule to the facts, the Court found no jurisdiction over the Delaware trustee.[116]

Third, the majority attempted to recast due process doctrine

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[111] *Hanson*, 357 U.S. at 254.
[112] *Id.* at 250-51.
[113] *Id.* at 251.
[114] *Id.* at 253.
[115] *Id.*
[116] *Hanson*, 357 U.S. at 254.

more in the form of a rule than a standard. Chief Justice Warren noted that there had been a jurisprudential shift "from the rigid rule of *Pennoyer* . . . to the flexible standard of *International Shoe Co.*"[117] The test which the majority now adopted represented a move back in the direction of the rigid rule of *Pennoyer*. Purposeful availment became "essential in each case";[118] without it, the *International Shoe* test could not be satisfied.

The four liberal dissenters staunchly defended all three elements of the liberal transformation of personal jurisdiction that had marked the line of cases from *International Shoe* to *McGee*. Their defense was set forth in a dissenting opinion by Justice Black, who had written for the Court in *McGee* and now was joined by Justices Brennan and Burton,[119] and in a separate dissent by Justice Douglas.[120]

First, they defended the expansion of personal jurisdiction beyond the limits set by *Pennoyer*. Indeed, Justice Black argued that "further relaxation [of due process limits on personal jurisdiction] seems certain."[121] The dissenters favored the expansion of personal jurisdiction and believed that it would continue.

Second, the dissenters favored a due process doctrine under which jurisdiction was based, not on the defendant's volitional conduct, but on the state's regulatory interest, subject to some general standard of fairness. Both dissents relied on *Mullane*, which had based jurisdiction on the state's interest in regulating a trust fund.

Justice Douglas posed the test as simply "whether the procedure is fair and just, considering the interests of the parties."[122] He noted Florida's "plain and compelling relation" to the disputed property, the closeness of the nexus between the settlor and the trustee, and the fact that the action would not result in the imposition of liability on the trustee.[123]

Justices Black, Brennan, and Burton would have found jurisdiction to exist because the litigation arose from a transaction that had "an abundance of close and substantial connections" with the forum state.[124] Once the close and substantial connection between

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[117] *Id.* at 251.
[118] *Id.* at 253.
[119] *Id.* at 256-62 (Black, J., dissenting).
[120] *Id.* at 262-64 (Douglas, J., dissenting).
[121] *Hanson*, 357 U.S. at 260 (Black, J., dissenting).
[122] *Id.* at 263 (Douglas, J., dissenting).
[123] *Id.*
[124] *Id.* at 260 (Black, J., dissenting).

the litigation and the forum state was established, the forum state should have jurisdiction unless litigating there "would impose such a heavy and disproportionate burden on a nonresident defendant that it would offend . . . 'traditional notions of fair play and substantial justice.' "[125] No such unfairness was present here. Florida, as the domicile of most of the principal claimants, was a "reasonably convenient forum" for the litigants.[126] Justice Black analogized the facts in *Hanson* to those in *Mullane*, noting that Florida had an interest in the litigation because it involved a will that was being administered in that state.[127]

The dissenters spoke scarcely at all of the need for purposeful conduct by the defendant. Justice Black did observe that the exercise of jurisdiction over the trustee was not unfair because it "chose to maintain business relations" with the settlor for eight years, "regularly communicating" with her concerning the business of the trust.[128] The fact of this intentional conduct was considered in applying the fairness test. Neither dissent, however, suggested that purposeful conduct by the defendant was "essential in every case."[129]

Third, the dissenters insisted that the *International Shoe* test should continue to be cast in terms of a flexible standard, generally fairness or justice under the circumstances.[130] They refused to identify any single factor, such as purposeful conduct, as dispositive.

III. The Resurgence of Conservative Ideology

Hanson had planted the seeds of a conservative resurgence, but they were a long time in sprouting. Most commentators dismissed *Hanson* as an aberrational case, and courts continued to follow the liberal philosophy of *McGee*.[131] The period from 1945 to 1977 witnessed an "unparalleled expansion" of state judicial juris-

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[125] *Id.* at 258-59 (citations omitted).

[126] *Hanson*, 357 U.S. at 259 (Black, J., dissenting).

[127] *Id.* at 260-61.

[128] *Id.* at 259.

[129] *Id.*

[130] *Id.* at 258-59, 263 (Douglas, J., dissenting).

[131] *See* Martin B. Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on* World-Wide Volkswagen v. Woodson *and* Rush v. Savchuck, 58 N.C. L. Rev. 407, 423 (1980); Rex R. Perschbacher, *Minimum Contacts Reapplied: Mr. Justice Brennan Has It His Way in* Burger King Corp. v. Rudzewicz, 1986 Ariz. St. L.J. 585, 595.

diction[132] as mid-twentieth century liberalism achieved a position of dominance in American law. The Supreme Court, after *Hanson*, fell silent on the topic. From 1958 until 1977, the Court decided no cases involving the limits imposed by the Due Process Clause on the exercise of personal jurisdiction.

By 1977, the composition of the Supreme Court had changed considerably. Of the four liberal dissenters in *Hanson*, only Justice Brennan remained. The liberal wing of the Court was reduced to two—Justices Brennan and Marshall. A conservative bloc, consisting of Chief Justice Burger and Justices Rehnquist and Powell, had arisen on the right, with Justices Blackmun, Stevens, Stewart, and White holding a centrist position. The stage was set for a resurgence of conservative ideology.

The Court now began to seize opportunities on a regular basis to return the doctrine of personal jurisdiction under the Due Process Clause to its conservative roots. Between 1977 and 1987, the Supreme Court decided no fewer than eleven cases addressing due process limitations on personal jurisdiction.[133]

The first of these eleven cases, *Shaffer v. Heitner*,[134] as might well be expected, functioned as a kind of transitional case. On the one hand, it marked the final advance of liberalism—the last personal jurisdiction case in which liberalism occupied new ground. On the other hand, it established a firm beachhead for the conservative resurgence.

A. *Liberalism's Final Frontier: The Reconceptualization of* Pennoyer

In *Shaffer*, the defendants were officers or directors of the Greyhound Bus Company, a Delaware corporation with its principal place of business in Arizona.[135] The plaintiff brought a shareholder's derivative suit based on actions by the defendants which had resulted in Greyhound being held liable for damages in an an-

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[132] *See* Louis, *supra* note 131, at 407.

[133] *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987); Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Helicopteros Nacionales De Colombia, S.A. v. Hall, 466 U.S. 408 (1984); Calder v. Jones, 465 U.S. 783 (1984); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); Insurance Corp. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982); Rush v. Savchuck, 444 U.S. 320 (1980); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Kulko v. Superior Court, 436 U.S. 84 (1978); Shaffer v. Heitner, 433 U.S. 186 (1977).

[134] 433 U.S. 186 (1977).

[135] *Id.* at 189.

titrust suit and a criminal contempt proceeding.[136]

The plaintiff brought the suit in Delaware state court, arguing that the court had *quasi in rem* jurisdiction over the defendants because they held stock in Greyhound.[137] A Delaware statute deemed stock in Delaware corporations to be present in Delaware.[138]

The Supreme Court held on a 7-1 vote, with Justice Rehnquist taking no part and Justice Brennan concurring in part and dissenting in part, that the Delaware state court had no jurisdiction over the defendants.[139] Writing for the majority, Justice Marshall set out to re-examine the "continued soundness of the conceptual structure" found in *Pennoyer*.[140]

As noted above,[141] one of the effects of mid-twentieth century jurisprudence was the collapse of the distinction between personal and property rights. Without a distinction between personal and property rights, the distinction between *in personam* and *in rem* jurisdiction seemed to lose its justification. Thus, Justice Marshall's re-examination of *Pennoyer*'s conceptual structure began with an acknowledgement that references to judicial jurisdiction over a thing were merely a customary way of referring to "jurisdiction over the interests of a person in a thing." That is, all proceedings, like all rights, are really against persons. Whether they are characterized as *in personam* or *in rem* depends on the number of persons affected.[142]

If all assertions of power were against persons, there was no justification for testing assertions of *in rem* or *quasi in rem* jurisdiction by a different test than *in personam* jurisdiction. If a direct assertion of power over a defendant in a particular case would violate the Due Process Clause, an indirect assertion of power should be impermissible as well.[143] The Court thus concluded that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[144] To the extent that *Pennoyer* or other prior decisions were inconsis-

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[136] *Id.* at 190.
[137] *Id.* at 191-92.
[138] *Id.* at 192.
[139] *Shaffer*, 433 U.S. at 216-17.
[140] *Id.* at 196.
[141] *See supra* notes 62-63 and accompanying text.
[142] *Shaffer*, 433 U.S. at 207 n.22.
[143] *Id.* at 209.
[144] *Id.* at 212.

tent with this standard, they were overruled.[145]

Shaffer, in other words, held that assertions of jurisdiction must be based on a "substantial modern justification."[146] The Court would not "perpetuat[e] ancient forms that [were] no longer justified."[147] The shift from the rigid *Pennoyer* rule to the flexible standard of *International Shoe* applied to *quasi in rem* and *in rem* as well as *in personam* jurisdiction. Another of the rigid categories that had characterized late nineteenth century conservative jurisprudence had crumbled.

Conservative Justice Powell concurred, but was wary of the scope of the victory for liberal jurisprudence staked out by Justice Marshall. Justice Powell agreed that the principles of *International Shoe* should be extended to govern *in rem* as well as *in personam* jurisdiction.[148] Justice Powell, however, would have reserved judgment on the question whether ownership of property located in the forum state, without more, was sufficient to establish jurisdiction over the owner to the extent of the value of the property.[149] In the case of real property in particular, Justice Powell argued, preserving traditional *quasi in rem* jurisdiction could avoid the "uncertainty" of the *International Shoe* standard.[150] Justice Powell, in other words, would have preferred that the Court create a rigid rule for *quasi in rem* jurisdiction with respect to real property as a kind of exception to the general *International Shoe* standard. In a separate concurring opinion, Justice Stevens agreed.[151]

B. The Conservative Beachhead: Purposeful Availment

1. *Shaffer v. Heitner*

Hanson had attempted to resurrect all of the elements of the conservative doctrine of personal jurisdiction. That is, it had (1) required purposeful availment by the defendant as a condition of jurisdiction; (2) used the purposeful availment requirement to limit the expansion of state court jurisdiction; and (3) recast per-

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[145] *Id.* at 212 n.39.

[146] *Id.* at 212.

[147] *Shaffer*, 433 U.S. at 217.

[148] *Id.* (Powell, J., concurring).

[149] *Id.*

[150] *Id.*

[151] *Id.* at 219 (Stevens, J., concurring). Justice Rehnquist took no part in the consideration or decision of the case. *Id.* at 217.

sonal jurisdiction more in the form of a fixed rule than a flexible standard. With respect to the third of these objectives, *Shaffer* represented a setback for conservativism because it brought *in rem* as well as *in personam* jurisdiction under the flexible *International Shoe* standard.

With respect to the first two objectives, however, *Shaffer* was a victory for conservative ideology. It affirmed the purposeful availment requirement and used it to halt the expansion of judicial jurisdiction. More specifically, applying the *International Shoe* standard to the facts, the Court held that mere stock ownership in a Delaware corporation did not constitute purposeful availment of the laws of Delaware, and thus the Delaware courts had no jurisdiction over the officers and directors.[152]

Justice Brennan dissented, refusing to concede the political dimension of the case. Agreeing that the proper test was the *International Shoe* standard, Justice Brennan argued, relying on *McGee*, that the state had sufficient interests to justify the assertion of jurisdiction.[153] Justice Brennan would have based liability not on the volitional conduct of the defendant, but on the state's regulatory interests. These included "a substantial interest" in providing a restitutionary remedy for local corporations that have been the victims of misconduct,[154] a "manifest regulatory interest" over the affairs of domestic corporations,[155] and a "recognized interest in affording a convenient forum for supervising and overseeing the affairs of an entity that is purely the creation of [its] law."[156]

Shifting to the *Hanson* rule, Justice Brennan noted that he would have approached it "differently" than the majority.[157] The defendants had "voluntarily associated" themselves with Delaware by entering into a long-term relationship with one of its domestic corporations.[158] Given this degree of voluntariness, Justice Brennan did not believe it "unfair" to subject the defendants to the jurisdiction of the Delaware courts.[159] For Justice Brennan, the ultimate question was whether jurisdiction was fair under the circumstances. Although the existence of purposeful conduct could be

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[152] *Shaffer*, 433 U.S. at 215-16.
[153] *Id.* at 222-24 (Brennan, J., concurring in part, dissenting in part).
[154] *Id.* at 223.
[155] *Id.*
[156] *Id.*
[157] *Shaffer*, 433 U.S. at 227.
[158] *Id.*
[159] *Id.* at 227-28.

one factor indicating that jurisdiction was fair, Justice Brennan would have accepted a more attenuated degree of purposefulness than the majority. Justice Brennan thus fought the conservatives on two fronts: he resisted making purposeful availment the central focus of personal jurisdiction, and he argued that, in any event, a weak form of purposefulness should suffice.

2. *World-Wide Volkswagen v. Woodson*

Shaffer's embrace of the purposeful availment test was reaffirmed three years later in *World-Wide Volkswagen Corp. v. Woodson*.[160] As in *Hanson*, the Court (1) required purposeful availment as a condition of state court jurisdiction; (2) used that concept to limit jurisdiction; and (3) attempted to recast personal jurisdiction in a form more closely approximating a rigid rule.

In *World-Wide Volkswagen*, the defendants were an automobile retailer and its wholesaler, both New York corporations, that had sold an Audi automobile to Harry and Kay Robinson in New York.[161] The following year, the Robinsons decided to drive to Arizona where they had purchased a new home.[162] As the Robinsons were driving through Oklahoma, another car struck their Audi causing a fire which injured three members of the family.[163] The Robinsons filed suit against the defendants in Oklahoma.[164]

The question before the Supreme Court was whether the Oklahoma court had personal jurisdiction over the defendants.[165] The Robinsons presented no evidence that the defendants conducted any business in Oklahoma, sold or shipped any products there, had any agents to receive process there, or advertised in that state.[166] The record did not indicate that any car sold by either defendant, with the sole exception of the Robinsons' Audi, had ever even entered Oklahoma.[167]

a. The Conservative Majority

The Court held on a 6-3 vote, in an opinion written by Justice

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[160] 444 U.S. 286 (1980).
[161] *Id.* at 288.
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *World-Wide Volkswagen*, 444 U.S. at 291.
[166] *Id.* at 289.
[167] *Id.*

White, that Oklahoma had no jurisdiction over the defendants because they had not purposefully availed themselves of the privileges and benefits of Oklahoma law.[168] The clear message was that, if the purposeful availment test could not be met, the *International Shoe* standard could not be satisfied.[169]

The Robinsons had argued that it was foreseeable that the Audi would cause injury in Oklahoma, and thus the Oklahoma courts should have jurisdiction.[170] Foreseeability alone, however, was not sufficient to confer jurisdiction under the Due Process Clause.[171] The Court specifically stated that:

> the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.[172]

Thus, purposeful availment required that jurisdiction be based on the defendant's own conduct.

Emphasizing the necessity of volitional conduct by the defendant, the Court quoted the language from *Hanson* holding that the "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State."[173] In this case, the Audi had found its way to Oklahoma as a result of the unilateral act of the Robinsons, not as a result of the defendant's conduct. The Oklahoma courts, therefore, had no jurisdiction.

Justice White's opinion noted that, had the car reached

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[168] *Id.* at 295.

[169] *Id.* at 295-99. Justice White began his discussion by noting that jurisdiction existed only if it was reasonable to require the defendant to defend the suit in the forum state. *Id.* at 292. The reasonableness of such a requirement depended upon several factors. *Id.* The primary concern was the burden on the defendant. *Id.* Other factors included the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the interest of the states in furthering substantive social policies. *Id.* This part of his opinion, with its emphasis on a multi-factored reasonableness standard, might have been written by the liberal dissenters in *Hanson*. *See id.* at 292. In the end, however, the elaborately formulated standard turned out to be essentially irrelevant to the decision. The Court did not attempt to apply these factors to the facts, but held that jurisdiction did not exist because of the absence of purposeful availment. *Id.* at 299.

[170] *World-Wide Volkswagen*, 444 U.S. at 295.

[171] *Id.*

[172] *Id.* at 297.

[173] *Id.* at 298 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

Oklahoma as a result of "the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States," jurisdiction would have existed.[174] For example, jurisdiction would exist where the defendant "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."[175] In such cases, the defendant's contact with the forum state would be attributed to the defendant's purposeful conduct and not the unilateral acts of others.

The Court explained the reasons for its insistence upon purposeful availment by the defendant. Such a requirement "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."[176] A defendant with "clear notice" that it is subject to suit in the forum state can insure against liability or sever its connections with the forum and thus avoid risk to which it does not consent.[177]

These considerations of predictability and notice also underlay the conservatives' preference for a jurisprudence of rules rather than standards. Once again, the premises of conservative political and jurisprudential ideology mutually reinforced each other.

b. The Liberal Dissents

Justice Brennan dissented, reiterating the position of the dissenters in *Hanson*. First, he rejected the requirement of purposeful availment. Rather, he insisted, the "clear focus" of the *International Shoe* test "was on fairness and reasonableness."[178] He argued that, in *International Shoe*, "the existence of contacts, so long as there were some, was merely one way of giving content to the determination of fairness and reasonableness."[179]

The important consideration in determining fairness and reasonableness was the weight of the state's interest in adjudicating the case. Justice Brennan noted that the interest of the forum state and its connection to the litigation were strong because

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[174] *Id.* at 297.
[175] *World-Wide Volkswagen*, 444 U.S. at 298.
[176] *Id.* at 297.
[177] *Id.*
[178] *Id.* at 300 (Brennan, J., dissenting).
[179] *World-Wide Volkswagen*, 444 U.S. at 300 (Brennan, J., dissenting).

Oklahoma was the site of the accident and the place where the plaintiffs were hospitalized when the suit was filed.[180] Evidence and witnesses were in Oklahoma, and the state had an interest in enforcing its laws and keeping its highways safe.[181] In addition, the defendants had derived substantial benefits from the forum state. Specifically, Oklahoma's building of highways and its protection of other automobile dealers who would service the Robinson's Audi facilitated interstate travel and thus enhanced the value of the defendants' business.[182]

Indeed, Justice Brennan called in quite explicit terms for a reduced emphasis on "the rights of defendants." After quoting Justice Black's remarks in *McGee* concerning the trend toward expanding jurisdiction, he noted that the nationalization of commerce and ease of transportation and communication had accelerated since 1957, when *McGee* was decided.[183] Thus, "constitutional concepts of fairness no longer require[d] the extreme concern for defendants that was once necessary."[184] Justice Brennan chastised the majority for "accord[ing] too little weight to the strength of the forum State's interest in the case . . . ."[185] Jurisdiction should be based on the state's regulatory interests, not the volitional conduct of the defendant.

Justice Brennan repeated his tactic from *Shaffer* of attempting to define purposefulness in an attenuated way, while also opposing any requirement of purposefulness. He argued that the defendants were "not unconnected with the forum"[186] because "[t]he sale of an automobile does *purposefully* inject the vehicle into the stream of interstate commerce so that it can travel to distant States."[187] The dealer could foresee that the car would go to Oklahoma and actually intended to sell a commodity which, by its very nature, would travel to distant states.[188]

Justice Marshall, writing a separate dissent in which Justice Blackmun concurred, agreed.[189] Justices Marshall and Blackmun

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[180] *Id.* at 305.
[181] *Id.*
[182] *Id.* at 307.
[183] *Id.* at 308.
[184] *World-Wide Volkswagen*, 444 U.S. at 309.
[185] *Id.* at 299.
[186] *Id.*
[187] *Id.* at 306.
[188] *Id.*
[189] *World-Wide Volkswagen*, 444 U.S. at 313-17 (Marshall, J., dissenting). Although

found that jurisdiction was based on the "deliberate and purposeful actions of the defendants themselves in choosing to become part of a nationwide, indeed a global, network for marketing and servicing automobiles."[190]

Under the dissenters' analysis, the volitional act was merely going into the business of selling automobiles. No further intent with respect to the forum state was necessary. Indeed, once the seller was in the business, efforts to limit state power over it would be unavailing. "It may be true," Justice Brennan explained, "that each [defendant] sincerely intended to limit its commercial impact to the limited territory. . . . But obviously these were unrealistic hopes that cannot be treated as an automatic constitutional shield."[191] Justice Marshall similarly noted that "[s]ome activities by their very nature may foreclose the option of conducting them in such a way as to avoid subjecting oneself to jurisdiction in multiple forums."[192]

The dissenters thus sought to build a law of personal jurisdiction with respect to the sale of commodities that, in its structure, closely approximated modern strict products liability.[193] In strict products liability, the defendant is liable for injuries caused by his products even though his only volitional act was to go into the business of selling a product that could cause this type of injury.[194] Imposition of liability is fair because of the manufacturer's ability to spread the risk.[195] Further, attempts to limit liability by contract-based actions such as disclaimers of warranty often are disregarded.[196] The seller cannot contract his way out of liability, once he performs the initial act of selling the product.

So, too, in the liberal jurisdictional analysis, the single volitional act of placing the product in the stream of commerce conferred jurisdiction on the state where the product caused injury. As

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joining with Marshall in his dissent, Justice Blackmun wrote separately to make clear that, for him, the "critical factor" was the "nature of the instrumentality," which was intended to travel to distant places. *Id.* at 318 (Blackmun, J., dissenting).

[190] *Id.* at 314 (Marshall, J., dissenting).

[191] *Id.* at 305-06 (Brennan, J., dissenting).

[192] *Id.* at 316 (Marshall, J., dissenting).

[193] *See* Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 92-96 (Philip B. Kirkland & Gerhard Casper eds.). Professor Brilmayer has noted the analogy between substantive tort doctrine and minimum contacts analysis in *World-Wide Volkswagen.*

[194] *See generally* KEETON ET AL., *supra* note 12, at 692-94.

[195] KEETON ET AL., *supra* note 12, at 693.

[196] KEETON ET AL., *supra* note 12, at 692.

Justice Marshall noted, the profits from this activity may be used to pay the costs of suit and the risk can be spread by obtaining insurance.[197] Attempts to limit liability by bargaining only in certain jurisdictions would be disregarded.

The second element of the *Hanson* dissent adopted by the dissenters in *World-Wide Volkswagen* was to oppose the majority's attempt to limit the expansion of personal jurisdiction. All of the dissenters, of course, would have found jurisdiction on the facts of this case. Indeed, Justice Brennan, as noted above,[198] observed that the changes in transportation and communication which had justified a more expansive view of jurisdiction actually had accelerated. The obvious suggestion was that jurisdiction should continue to expand.

Finally, like the dissenters in *Hanson*, the dissenters in *World-Wide Volkswagen* opposed the attempt to rigidify the *International Shoe* standard. The Court in *International Shoe*, Justice Brennan argued, had "specifically declined to establish a mechanical test based on the quantum of contacts between a State and the defendant."[199] In other words, *International Shoe* had established a standard to be applied to the facts of each case and that standard was fairness and reasonableness. Justice Marshall similarly observed that "[t]he concepts of fairness and substantial justice . . . are not readily susceptible of further definition . . . and it is not surprising that the constitutional standard is easier to state than to apply."[200]

After *World-Wide Volkswagen*, it was clear that a majority of the Court believed that the *International Shoe* test was satisfied only where the defendant had purposefully availed himself of the benefits and protections of the forum state's laws. Nor was this a sterile debate over a technicality. Each of the three cases requiring purposeful availment up to that point—*Hanson*, *Shaffer*, and *World-Wide Volkswagen*—had found it wanting. The purposeful availment requirement clearly had the power to limit state court jurisdiction.

Justice Brennan's attempt to focus attention on the court's regulatory interests and the overall fairness of jurisdiction had been unsuccessful. Beginning with *World-Wide Volkswagen*, the

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[197] *World-Wide Volkswagen*, 444 U.S. at 317 (Marshall, J., dissenting).

[198] *See supra* note 183 and accompanying text.

[199] 444 U.S. at 300 (Brennan, J., dissenting).

[200] *Id.* at 313 (Marshall, J., dissenting).

terms of the debate began to shift. The argument was not over whether purposeful availment would be required, but how to define the degree of purposefulness needed.

Because purposeful availment had not been found in any Supreme Court decision since *Hanson*, it was less clear whether purposeful availment was a sufficient basis for jurisdiction. Although the Court decided several personal jurisdiction cases in the interim,[201] it was not until the Court's 1985 decision in *Burger King*

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[201] In 1984, the Supreme Court decided three cases by lopsided majorities without really answering that question. In Keeton v. Hustler Magazine, 465 U.S. 770 (1984), the Court held that the sale of some 10,000 to 15,000 copies of a magazine in New Hampshire each month was sufficient to confer jurisdiction over a foreign corporation. *Id.* at 772-75. Justice Rehnquist's opinion for the Court began its due process discussion with language that could have been written by Justice Brennan. Rehnquist began by asking whether it was "fair" to require the defendant to appear in New Hampshire. *Id.* at 775. He then inquired whether New Hampshire had a legitimate interest in adjudicating the claim. After a fairly extensive discussion which concluded that New Hampshire did have such an interest, *id.* at 775-78, Justice Rehnquist observed that the defendant had "continuously and deliberately exploited the New Hampshire market." *Id.* at 781. Accordingly, the state had jurisdiction. *Id.* Thus, it seemed that *International Shoe* required fairness, which in turn required both that the state have an interest in the adjudication and that the defendant had purposefully reached out to the state. No member dissented, although Justice Brennan wrote separately concurring in the judgment. *Id.* at 782.

In Calder v. Jones, 465 U.S. 783 (1984), decided the same day, the Court held unanimously that California had personal jurisdiction over a reporter and editor for the National Enquirer with respect to a professional entertainer's libel claim against them. *Id.* at 788-89. The article in which the reporter and editor were involved was drawn from California sources and caused harm in California, where the plaintiff resided. *Id.* Jurisdiction was proper based on the effects in California of the defendants' out-of-state conduct. *Id.* at 789. The Court noted that defendants' "intentional, and allegedly tortious, actions were expressly aimed at California." *Id.* That is, the defendants participated "in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis." *Id.* at 790. *Calder* seemed to suggest that the defendants' purposeful conduct directed at the forum state was sufficient. The discussion of the state's interest which occupied most of the *Keeton* opinion was absent.

Finally, in Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984), the Court decided by a 8-1 vote that the Texas courts had no jurisdiction over a Colombian corporation in a wrongful death action. *Id.* at 418-19. All the parties conceded that plaintiff's claims did not "arise out of" and were "not related to" the defendant's activities in Texas. *Id.* at 415. *Helicopteros* thus differed from nearly all other prior personal jurisdiction cases before the Supreme Court in that it involved an assertion of general jurisdiction rather than specific jurisdiction. Citing Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952), the Court held that a state could exercise jurisdiction over a defendant for a claim unrelated to the defendant's contacts with the forum state only if the defendant's contacts with that state were "continuous and systematic." 466 U.S. at 415-17. The defendant's contacts—sending its chief executive officer to Houston for a session of contract negotiations; accepting checks drawn on a Houston bank; purchasing helicopters, equipment and training services from a Texas corporation; and sending personnel to Texas for training—did not meet this test. *Id.* at 416-18. Justice Brennan dissented. *Id.* at 419.

Corp. v. Rudzewicz[202] that the question finally was answered.

C. *The Liberal Counterattack:* Burger King

Contemporary personal jurisdiction doctrine crystallized in *Burger King*. The decision established once and for all the necessity of purposeful availment, while resolving the question of the relationship between the purposeful availment requirement and the other factors discussed in cases dating back to *McGee*. *Burger King* also represented a liberal counterattack against the resurgence of conservative ideology in personal jurisdiction cases. Writing for the majority, Justice Brennan managed to weaken the purposeful availment test while softening the rigidity that had characterized *Hanson* and *World-Wide Volkswagen*.

In *Burger King*, the defendants were two Michigan residents who had acquired a franchise from the Burger King Corporation.[203] The defendants had applied for this franchise at Burger King's Michigan office, but had conducted some negotiations directly with Burger King's corporate headquarters in Florida.[204] The franchise agreement contained a Florida choice of law clause and required that monthly payments be made to the Florida office.[205] When the defendants fell behind in their payments, Burger King brought suit against them in federal district court in Florida.[206]

The Supreme Court held that Florida had jurisdiction over the defendants.[207] In his opinion for the Court, Justice Brennan formulated the most thorough explication of the requirements for personal jurisdiction since *International Shoe*.

The standard for personal jurisdiction now was a two-step test. First, the defendant must have " 'purposefully directed' his activities at residents of the forum."[208] The " 'unilateral activity' " of another person could not satisfy the requirement of the defendant's purposeful contact with the forum.[209] At the same time, the requirement of purposeful availment could be met by placing a product in the stream of commerce with the expectation that it

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[202] 471 U.S. 462 (1985).
[203] *Id.* at 466-67.
[204] *Id.*
[205] *Id.* at 465-66.
[206] *Id.* at 468.
[207] *Burger King*, 471 U.S. at 487.
[208] *Id.* at 472 (quoting Keeton v. Hustler Magazine, 465 U.S. 770 (1984)).
[209] *Id.* at 474 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

would reach consumers in the forum.[210]

Once the requirement of purposeful contacts was satisfied, the court must then consider the contacts in light of other factors to determine whether jurisdiction would be consistent with fair play and substantial justice, that is, whether it would be reasonable.[211] These factors were those listed, but essentially disregarded, in the Court's analysis in *World-Wide Volkswagen*:[212] the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the judicial system's interest in efficient dispute resolution, and the interest of the states in furthering fundamental substantive social policies.[213]

Justice Brennan thus fused the purposeful availment test from *Hanson* with the reasonableness test from *McGee*. Jurisdiction would not lie unless the defendant had satisfied the *Hanson* purposeful availment test. Indeed, once it was shown that the defendant had purposefully directed his activities at the forum, to defeat jurisdiction the defendant "must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable."[214] In other words, once purposeful availment was shown, the burden actually shifted to the defendant to demonstrate that the reasonableness test was not met.

At the same time, the various factors demonstrating the reasonableness of jurisdiction, on occasion, could serve to establish jurisdiction "upon a lesser showing of minimum contacts than would otherwise be required."[215] That is, more attenuated purposeful contacts would suffice if other facts evidencing reasonableness were sufficiently present.

Justice Brennan's opinion was a brilliant exercise of synthesis. He managed to organize a long series of decisions that had really established only two points: that purposeful availment was a prerequisite of personal jurisdiction, and that other facts were to be taken into account as well. Justice Brennan solved the riddle of the relationship between the purposeful availment test and the other factors. He also persuaded the majority to join an opinion creating

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[210] *Id.* at 473.
[211] *Id.* at 476-77.
[212] *See supra* note 169.
[213] *Burger King*, 471 U.S. at 477.
[214] *Id.*
[215] *Id.*

a framework that was closer to the liberal position than any opinion of the Court since *McGee*.

As mentioned previously, since the decision in *Hanson*, the Supreme Court had refused to find that the *International Shoe* standard was met in any case in which purposeful availment was not shown. Unable to kill the purposeful availment test, Justice Brennan defanged it. Where the reasonableness of jurisdiction was sufficiently established, the Court held, a weaker showing of purposeful availment would suffice. The Court accepted Justice Brennan's preferred test of reasonableness under the circumstances as a substantial, if not complete, substitute for purposeful availment. Inasmuch as no Supreme Court case after *Mullane* in 1950 had found personal jurisdiction without some form of purposeful activity directed at the forum state, Justice Brennan could hardly have hoped for more.

Purposeful availment—at least in anything other than its most attenuated form—was, of course, considerably more than Justice Brennan would have required to find personal jurisdiction. Thus, where purposeful availment is shown, the reasonableness test largely disappears. Indeed, in the *Burger King* formulation, the burden actually shifts to the defendant to show *compelling* reasons why jurisdiction is not reasonable.

In addition to moving the Court closer to the liberal view that personal jurisdiction could be premised on a weak showing of purposeful conduct by the defendant, *Burger King* also softened the mechanical approach which had characterized *World-Wide Volkswagen*. Justice Brennan's sliding scale—less purposeful availment necessary where more reasonableness is shown, and little reasonableness necessary where purposeful availment is established—in form was a move back toward the liberal standard of reasonableness under the circumstances and away from Justice White's attempt in *World-Wide Volkswagen* to write more rigid rules.

Applying the law to the facts, the Court found that the defendant had "purposefully availed himself of the benefits and protections of Florida's laws."[216] The Court "rejected the notion that personal jurisdiction might turn on 'mechanical' tests."[217] Thus, the mere fact of a contract between the defendant and a corpora-

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[216] *Id.* at 482 (quoting Burger King v. Macshara, 724 F.2d 1505, 1513 (11th Cir. 1984) (Johnson, J., dissenting)).

[217] *Id.* at 478 (quoting *International Shoe*, 326 U.S. at 319).

tion in the forum state was not necessarily enough for jurisdiction. Here, however, the defendant had "deliberately 'reached out beyond' Michigan"[218] in order to affiliate with a national organization—an affiliation which was long term and involved exacting regulation of his business from Florida. The Florida choice of law provision in particular showed a purposeful invocation of the benefits and protections of Florida's laws.[219]

Further, the defendant had failed to show facts that would "persuasively . . . outweigh" the fact of purposeful availment.[220] The Court could not conclude that Florida had no legitimate interest in adjudicating the claim.[221] To the extent that the defendant was inconvenienced by litigating in Florida, that problem was best handled through a change of venue.[222]

D. Political Stalemate: Asahi Metal

In a series of decisions handed down between 1977 and 1985, the Court had made it clear that purposeful availment, resurrected by *Shaffer* in 1977, was the *sine qua non* of personal jurisdiction under the *International Shoe* standard. By the time of the Court's 1985 decision in *Burger King*, even Justice Brennan had surrendered to the conservative insistence that liability be based on the defendant's volitional conduct.

By 1987, the conservative bloc on the Court had grown at the expense of the centrists to include Chief Justice Rehnquist and Justices Powell, Scalia, and O'Connor. The centrist membership had shrunk to three—Justices Blackmun, Stevens, and White. Justices Brennan and Marshall continued to occupy the liberal wing.

Having established the necessity of purposeful availment, an increasingly conservative Court shifted its agenda to requiring even greater degrees of purposeful conduct. At the same time, the Court endeavored to restore to personal jurisdiction doctrine at least some of the rigidity of the *Pennoyer* rule.

The efforts of the conservative bloc to push personal jurisdiction doctrine to the right resulted in a stalemate in two successive decisions. *Burger King*, decided in 1985, remains the last Supreme

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[218] *Burger King*, 471 U.S. at 479 (quoting Travelers Health Ass'n. v. Virginia, 339 U.S. 643, 647 (1950)).

[219] *Id.* at 481-82.

[220] *Id.* at 482.

[221] *Id.* at 482-83.

[222] *Id.* at 483-84.

Court personal jurisdiction case to produce a majority opinion.

The first stalemate came in 1987 with the Court's decision in *Asahi Metal Industry Co. v. Superior Court.*[223] In that case, the plaintiff was a motorcyclist who was injured in a crash on a California highway allegedly caused by an explosion in the rear tire of the motorcycle.[224] The plaintiff filed suit in California state court against the Taiwanese manufacturer of the tire and against Asahi Metal, a Japanese company that had manufactured the tire's valve assembly.[225] Eventually all claims were settled, except for an indemnity action by the tire manufacturer against Asahi Metal, which sought to quash the summons.[226]

The question before the Supreme Court was whether the California court had personal jurisdiction over Asahi Metal.[227] The Court held unanimously that it did not, but divided sharply on the reasons. All members of the Court concurred that Brennan's opinion from *Burger King* set forth the governing standards, but disagreed over how they applied.

The justices split into two camps, one conservative and one liberal, on the issue of whether the defendant had satisfied the purposeful availment test. The ninth member of the Court, Justice Stevens, would not have reached that question.[228] Eight members of the Court, however, agreed that jurisdiction over Asahi Metal did not exist because jurisdiction would not be reasonable.[229]

The divisions were reflected in the two major opinions written in the case. The first was that of Justice O'Connor, who (1) announced the judgment of the Court, (2) delivered the opinion of the Court with respect to the reasonableness test, and (3) wrote for a conservative group of four justices on the issue of purposeful availment. The second was that of Justice Brennan, who set forth the liberal position on purposeful availment, which also reflected the view of four justices.

Whether Asahi Metal had purposefully directed activities at California turned on the meaning of the stream of commerce doctrine enunciated in *World-Wide Volkswagen.* Justice White's opin-

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[223] 480 U.S. 102 (1987).
[224] *Id.* at 105-06.
[225] *Id.* at 106.
[226] *Id.*
[227] *Id.* at 108.
[228] *Asahi Metal*, 480 U.S. at 121-22.
[229] *Id.* at 116.

ion for the Court in that case had stated, albeit in dictum, that "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."[230] Although in such a situation the product may be transported to the forum state by parties other than the defendant, the act of taking the product to the forum will be regarded as the purposeful direction of activities toward the forum state by the defendant rather than the "unilateral activity of those who claim some relationship" with the defendant.[231]

The conservative group, comprising Justices O'Connor, Rehnquist, Scalia, and Powell, sought to require a higher level of purposeful activity as a necessary condition for the exercise of state power. Specifically, Justice O'Connor argued that "a defendant's *awareness* that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State."[232] In other words, placing a product into the stream of commerce with knowledge that it would reach the forum state was not purposeful availment. Rather, a conclusion that the defendant purposefully directed its activities toward the forum state required some additional conduct. Such conduct might include designing the product for the market in the forum state, advertising in that state, setting up a customer service network in the state, or marketing through sales agents there.[233]

The record contained evidence that Asahi Metal was "fully aware" that its valve stems would be marketed in California.[234] In the conservative view, however, this mere awareness was insufficient. Asahi Metal had not engaged in any of the additional conduct, beyond mere awareness, necessary to establish purposeful availment. It had no offices, property, or agents in California, did not advertise or solicit business there, did not design its product in anticipation of sales in California, and did not design or control the distribution system that carried its products there.[235] The Cali-

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[230] *World-Wide Volkswagen*, 444 U.S. at 297-98.

[231] *Id.* at 298.

[232] *Asahi Metal*, 480 U.S. at 112.

[233] *Id.*

[234] *Id.* at 107.

[235] *Id.* at 112-13.

fornia courts thus had no personal jurisdiction over Asahi Metal.

The liberal group, comprising Justices Brennan, Marshall, Blackmun, and White, would have permitted the exercise of state power over Asahi Metal on a lesser showing of purposeful conduct by the defendant. Specifically, the liberal group rejected the need for a showing of additional conduct beyond placing a product in the stream of commerce with awareness that it may or will reach the forum state. As Justice Brennan explained,

> The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. Nor would the litigation present a burden for which there is no corresponding benefit.[236]

The liberals charged that Justice O'Connor's opinion represented "a marked retreat" from the Court's analysis in *World-Wide Volkswagen*. The charge gained considerable weight from the fact that Justice White, who wrote for the majority in *World-Wide Volkswagen*, joined Justice Brennan's opinion in *Asahi Metal*. The liberals argued that *World-Wide Volkswagen* had required only that the defendant place the product in the stream of commerce with the "expectation" that it would reach the forum state.[237] This expectation was sufficient to serve the ends of the purposeful availment requirement: to permit the defendant either to insure against litigation or to avoid litigation by severing ties with the forum state.[238]

Justice Stevens, the deciding vote on the purposeful availment issue, wrote a separate opinion arguing that the issue need not be reached since jurisdiction over Asahi Metal, in any event, was not reasonable.[239] To the extent that the issue should have been reached, moreover, Justice Stevens disagreed with both Justice O'Connor and Justice Brennan, believing that it was not possible to draw "an unwavering line" between "mere awareness" and "purposeful availment."[240] Rather, Justice Stevens would have engaged in a case-by-case determination based on "the volume, the

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[236] *Id.* at 117.
[237] *Asahi Metal*, 480 U.S. at 119 (quoting *World-Wide Volkswagen*, 444 U.S. at 298).
[238] *Id.* at 119.
[239] *Id.* at 121.
[240] *Id.* at 122.

value, and the hazardous character of the components."[241] He did indicate that, "[i]n most circumstances" involving the volume of sales present in *Asahi Metal*, he would find purposeful availment to exist.[242]

The ideological split over the degree of purposefulness required, as noted above, ultimately did not affect the disposition of the case. All of the justices, save Justice Scalia,[243] concurred in the portion of Justice O'Connor's opinion that found that California's exercise of jurisdiction over Asahi Metal would not be *reasonable*.[244]

E. Jurisprudential Stalemate: Burnham

Ideological stalemate reappeared three years later in *Burnham v. Superior Court*.[245] This time, the stalemate arose from another attempt by the conservative bloc to push the jurisprudential dimension of personal jurisdiction doctrine further to the right.

In *Burnham*, the defendant, Dennis Burnham, and his wife had separated while living in New Jersey, with Mrs. Burnham moving to California and taking custody of their children.[246] A few months later, the defendant traveled to southern California on business.[247] After concluding his business, he went north to the San Francisco Bay area, where his wife resided, to visit his chil-

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[241] *Id.*

[242] *Asahi Metal*, 480 U.S. at 122. Justices White and Blackmun, who joined Justice Brennan's opinion on the meaning of purposeful availment, also joined with Justice Stevens. Presumably they were sympathetic with his view that purposeful availment need not be reached; but if it was reached, they were prepared to find it under either Justice Brennan's approach or Justice Stevens'.

[243] The opinion does not explain Justice Scalia's reasons for refusing to join in this portion. One explanation may be that, having decided that the purposeful availment test was not met, Justice Scalia saw no reason to reach the issue of the reasonableness of the Court's jurisdiction—an approach perfectly consistent with Justice Brennan's two-step test from *Burger King*. A second explanation may be that Justice Scalia objected to the reasonableness test, which, after all, was the legacy of Justice Brennan and the liberal wing of the Court.

[244] Applying the five factors listed by Justice Brennan in *Burger King* (taken from Justice White's opinion in *World-Wide Volkswagen*), the Court found the burden on an alien defendant to be "severe." *Id.* at 114. At the same time, inasmuch as the only claim still remaining was an indemnification claim between two foreign corporations based on a transaction which had occurred in Taiwan, neither the plaintiff's interest in a convenient or effective forum nor California's interest in adjudicating the dispute was sufficient to outweigh the burden on the defendant. *Id.*

[245] 495 U.S. 604 (1990).

[246] *Id.* at 607.

[247] *Id.* at 608.

dren.[248] While there, he was served with a summons in a divorce suit filed by Mrs. Burnham in California state court earlier that month.[249]

The Supreme Court held unanimously that Burnham's presence in the state at the time he was served with process was sufficient to confer jurisdiction upon the California courts.[250] As in *Asahi Metal*, however, the unanimity of result was accompanied by sharp disagreement over the grounds for the result.

Once again, two major opinions represented the opposite poles of the ideological split. The split, however, fell not in the political, but the jurisprudential dimension. All nine justices agreed that the California court had power over the defendant, although they disagreed about the nature of the standard to be applied.[251]

1. The Conservative Position

The conservative position was articulated by Justice Scalia, who announced the judgment of the Court and wrote an opinion joined by conservative Justices Rehnquist and Kennedy and, in part, by his more moderate colleague, Justice White. The conservative position was that any procedure which " 'has been immemorially the actual law of the land . . . *is* due process.' "[252] Cases and commentary dating back to the early nineteenth century satisfied the conservatives that jurisdiction based on presence was an accepted practice under the common law before *Pennoyer*.[253] Because it is "one of the continuing traditions of our legal system," jurisdiction based on physical presence alone must be consistent with due process.[254] Indeed, the conservatives argued, presence was part of the tradition that defined *International Shoe*'s standard of "traditional notions of fair play and substantial justice" and thus it

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[248] *Id.*

[249] *Id.*

[250] *Burnham*, 495 U.S. at 628.

[251] *Id.* at 640 (Stevens, J., concurring). Justice Stevens wrote separately, explaining that the broad reach of both Justice Scalia's conservative opinion and Justice Brennan's liberal opinion prevented him from joining either. *Id.* He noted simply that the historical evidence identified by Justice Scalia, the fairness considerations identified by Justice Brennan, and the common sense displayed by Justice White in a separate concurrence all combined to suggest that this was a "very easy case" for affirmance of the California court's jurisdiction. *Id.*

[252] *Id.* at 619 (quoting Hurtado v. California, 110 U.S. 516, 528-29 (1884)) (emphasis added).

[253] *Id.* at 610-16.

[254] *Id.* at 619.

would be "perverse" to say that presence could be held unconstitutional under that standard.[255]

The strongest obstacle to the conservative position was the decision in *Shaffer v. Heitner*.[256] *Shaffer* had stated quite clearly that "all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[257] This seemed to suggest that presence was a sufficient basis for personal jurisdiction only if it satisfied the two-part *Burger King* test.

The three conservatives, however, rejected this reading of *Shaffer*, with centrist Justice White refusing to join this portion of the opinion.[258] Claiming that the quoted language could be properly understood only in context,[259] Justice Scalia argued that *Shaffer* had addressed merely the question whether *quasi in rem* jurisdiction should be measured by the same standards as *in personam* jurisdiction. Thus, when *Shaffer* said "all assertions," it did not really mean "all assertions," but only "assertions of *quasi in rem* jurisdiction."[260] *Shaffer* remained good law insofar as it subjected assertions of *quasi in rem* jurisdiction to the *International Shoe* standard, but it could not be read to require that presence meet this standard as well.

Justice Scalia openly conceded that his "basic approach" to due process was different from that adopted by the Court in

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[255] *Burnham*, 495 U.S. at 619.

[256] 433 U.S. 186 (1977).

[257] *Id.* at 212.

[258] *See Burnham*, 495 U.S. at 628 (White, J., concurring). Justice White wrote a separate opinion explaining that he had joined in the first part of Justice Scalia's opinion because jurisdiction based on presence was "so widely accepted throughout this country that I could not possibly strike it down." *Id.* On the other hand, Justice White, unlike the conservatives, would not rule out categorically the re-evaluation of "traditionally accepted procedures" where they were shown to be "so arbitrary and lacking in common sense in so many instances that it should be held violative of due process in every case." *Id.* Since no such showing had been made, he declined to engage in a determination whether presence was an arbitrary basis of jurisdiction in this case. *Id.*

[259] *Id.* at 620. The Court had said:

> The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant.
>
> We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.

Id. at 620-21 (quoting *Shaffer*, 433 U.S. at 212).

[260] *Id.* at 621.

Shaffer, although he was not challenging the narrow holding in that case.[261] Unlike the Court in *Shaffer*, the conservatives in *Burnham* would conduct no "independent inquiry into the desirability or fairness of the prevailing in-state service rule."[262] Rather, the historical "pedigree" of presence alone was sufficient to validate it under the Due Process Clause.[263]

For the conservatives, *Burnham* presented an opportunity to stage an attack against the *International Shoe* line of cases on jurisprudential grounds. Deeply disturbed by the subjectivity of the flexible standard adopted by the Court in *International Shoe* and applied to "all assertions" of jurisdiction in *Shaffer*,[264] the conservatives sought to reinsert a degree of rigidity into the test for determining whether exercises of jurisdiction were consistent with due process. They attempted to convert the *International Shoe* standard back to a set of rules and thus retake some of the ground lost by conservative ideology in *Shaffer*.

The first rule proposed by the conservatives was borrowed from the late nineteenth century decision in *Hurtado v. California*:[265] that which "has been immemorially the actual law of the land . . . is due process."[266] They proposed, in effect, a kind of metatest: a test for identifying the test which governs the case, and the metatest itself turned out to be a formal, rigid rule.

The rule that historical pedigree could validate an exercise of personal jurisdiction in the best formalist tradition was general, abstract, and seemingly mechanical in its application.[267] Further, if adopted, it actually displaced the flexible *International Shoe* standard in any case in which a historic pedigree for a rule could be identified. The conservatives proposed not merely moving the *International Shoe* standard closer to a rule; they proposed partially replacing it with a rule.

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[261] *Id.*

[262] *Id.*

[263] *Burnham*, 495 U.S. at 621.

[264] *See id.* at 623. Justice Scalia argued that Justice Brennan's "proposed standard of 'contemporary notions of due process' . . . measures state court jurisdictions . . . against each Justice's subjective assessment of what is fair and just." *Id.*

[265] 110 U.S. 516 (1884).

[266] *Burnham*, 495 U.S. at 619 (quoting *Hurtado*, 110 U.S. at 528-29).

[267] Justices Scalia and Brennan heatedly disputed the actual historical status of jurisdiction based on presence. Justice Brennan, for example, argued that transient jurisdiction was a nineteenth century creation, which would not have been recognized in more ancient times, and thus was not "immemorially" the law of the land. *Id.* at 633-35 (Brennan, J., concurring).

Finding that jurisdiction based on presence did have a pedigree, the conservatives would have decided the case entirely outside the *International Shoe* standard. For the first time since 1945, the relevant authority was not *International Shoe*, but *Pennoyer*. Further, in the view of three conservatives, *Shaffer*, which had partially overruled *Pennoyer*, was to be narrowed considerably.

Having taken *Burnham* outside of the *International Shoe* line of cases, the conservatives proposed their second rule: service based on presence was a constitutionally sufficient basis for jurisdiction.[268] The California courts therefore had jurisdiction. The entire case could be decided by the application of two simple rules, without any reference at all to subjective considerations of fairness or reasonableness.

Although conservatives generally have opposed expansions of jurisdiction, *Burnham* did not represent an expansion. *Burnham* only ratified a form of jurisdiction which, in fact, had predated and was explicitly approved by *Pennoyer*. A form of jurisdiction acceptable to conservative Justice Field in 1877 was acceptable to conservative Justices Scalia, Rehnquist, and Kennedy in 1990. There was no reason for the conservatives to oppose the result in *Burnham* on political grounds.[269]

2. The Liberal Position

The liberal position was articulated in a concurring opinion by Justice Brennan in which Justices Marshall, Blackmun, and O'Connor joined.[270] The liberals agreed with the conservatives that the Due Process Clause "generally permits a state court to exercise jurisdiction over a defendant if he is served with process while voluntarily present in the forum State."[271] The liberals, however, rejected the conservative argument that a rule which has been "im-

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[268] *Id.* at 619.

[269] Justice Scalia did suggest in a footnote, however, that the concept of general jurisdiction based on minimum contacts might have represented a regrettable expansion of power and that, in future cases, it might be limited to cases involving corporations. *Id.* at 610 n.1.

[270] *Id.* at 628 (Brennan, J., concurring). Justice O'Connor's alignment with the liberals in *Burnham* is perhaps somewhat surprising because she had written the opinion for the conservatives in *Asahi Metal*. The implication seems to be that Justice O'Connor is sympathetic with the political dimension of conservative ideology, but not with the jurisprudential dimension.

[271] *Burnham*, 495 U.S. at 628-29.

memorially the actual law of the land" *ipso facto* "comports with due process simply by virtue of its 'pedigree' " and thus the liberals *would* undertake an "independent inquiry into the . . . fairness of the prevailing in-state service rule."[272]

The liberals argued that the conservatives' reliance on pedigree alone was inconsistent with *Shaffer*'s holding that "all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[273] In other words, the "critical insight" of *Shaffer* was that all jurisdictional rules "must satisfy contemporary notions of due process."[274] The historical pedigree of a rule was "an important factor"[275] in determining its constitutionality, but was not "decisive."[276] Indeed, were pedigree alone sufficient, the Court would have had no opportunity to review *quasi in rem* jurisdiction in *Shaffer*.

The liberals thus fought the move back to a rule-based jurisprudence every step of the way. They too had a metatest—and it was a standard, not a rule: all assertions of jurisdiction "must satisfy contemporary notions of due process."[277]

Justice Brennan then proceeded to undertake the independent inquiry into the fairness of jurisdiction based on presence, applying something very close to the two-part test he had enunciated for the Court in *Burger King*. Justice Brennan found that, by visiting the state, a transient defendant avails himself of the benefits and protections of the state.[278] Finding, in essence, purposeful availment, Justice Brennan then examined the most important factor in the reasonableness test: the burden on the defendant. Not only had modern transportation and communication made it "much less burdensome" to defend oneself in another state, but the fact that the defendant previously had traveled to the forum indicated that suit in the forum would not be "prohibitively inconvenient."[279] Thus, personal jurisdiction over a defendant based on voluntary presence generally would satisfy the requirements of due process.[280] There being no indication that the defendant's presence in

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[272] *Id.* at 629 (citations omitted).
[273] *Id.* (quoting *Shaffer*, 433 U.S. at 212).
[274] *Id.* at 630.
[275] *Id.* at 629.
[276] *Burnham*, 495 U.S. at 630 (quoting *Shaffer*, 433 U.S. at 212).
[277] *Id.*
[278] *Id.* at 637-38.
[279] *Id.*
[280] *Id.*

California was anything but voluntary, the California courts had jurisdiction over him.[281]

IV. IDEOLOGY AND PROVISIONAL REMEDIES

The great majority of Supreme Court cases involving the impact of the Due Process Clause on civil procedure deal with the subject of personal jurisdiction. There is a second, much smaller, group of Supreme Court civil procedure cases, however, which also involve the Due Process Clause. This group comprises those decisions dealing with the constitutionality of provisional remedies.

The provisional remedies cases seem, at first glance, to contradict the personal jurisdiction cases in a fairly striking way. As will be seen, however, the apparent contradiction masks an underlying ideological consistency between the two groups of decisions.

A. The Paradox

A consistent theme in the personal jurisdiction cases is the split between liberals and conservatives over the weight to be given to the Due Process Clause. The conservative position may be characterized in broad terms as a persistent attempt to strengthen the protection afforded by the Due Process Clause, while the liberal position was to weaken it.

Thus, it was the conservative Court of the *Lochner* era which initially proposed the idea in *Pennoyer* that the Due Process Clause imposed any limitations on personal jurisdiction.[282] Similarly, in a line of cases running from *Hanson* to *Asahi Metal*, the conservative wing of the Court would have used the Due Process Clause to void exercises of personal jurisdiction over defendants, except in cases in which the defendant had engaged in relatively significant amounts of purposeful conduct directed at the forum state.[283]

It was the liberal court of the New Deal era, on the other hand, which replaced the rigid rule of *Pennoyer* with the flexible standard of *International Shoe*.[284] Further, in a series of cases running from *Mullane* to *Asahi Metal*, the liberals would have permitted courts to exercise personal jurisdiction over defendants who

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[281] *Burnham*, 495 U.S. at 640.

[282] *See supra* notes 16-20 and accompanying text.

[283] *See supra* notes 106-200 and accompanying text.

[284] *See supra* notes 66-87 and accompanying text.

had engaged in only relatively attenuated forms of purposeful conduct directed at the forum state.[285] As long as jurisdiction was reasonable under the circumstances, the Due Process Clause presented no barrier to its exercise.

In the provisional remedies cases, however, the conservative and liberal wings of the Court appear to switch sides concerning the weight to be given the Due Process Clause. Suddenly, it is the conservative members of the Court who suggest that the Due Process Clause affords relatively little protection for defendants, while the liberal members support a stronger reading of the Clause.

This line of cases began with the Court's 1972 decision in *Fuentes v. Shevin*.[286] In *Fuentes*, the Supreme Court held that Florida and Pennsylvania replevin statutes that permitted the seizure of a defendant's possessions based on a plaintiff's *ex parte* application and the posting of a security bond violated the Due Process Clause.[287]

The case was decided by a bare 4-3 majority, with liberal Justices Brennan, Douglas, and Marshall, joined by their moderate colleague, Justice Stewart, voting to strike down the statutes. Conservative Chief Justice Burger, joined by moderate Justices Blackmun and White, dissented. Chief Justice Burger's newly-appointed conservative colleagues, Justices Rehnquist and Powell, had not been present for oral argument and did not participate in the consideration or decision of the case.[288]

Two years later, however, the two new conservative members of the Court made their impact felt. In *Mitchell v. W.T. Grant Co.*, the Court upheld, by a 5-4 vote, a Louisiana sequestration statute which, like *Fuentes*, also permitted seizure of the defendant's property based on an *ex parte* application and the posting of a bond.[289] The alignment of justices was unchanged from *Fuentes*, except that Justices Powell and Rehnquist now joined the *Fuentes* minority to form a new, conservative majority. Justice White's opinion for the Court in *Mitchell* sought to distinguish *Fuentes* on the ground that the Louisiana sequestration statute was "sufficiently different" from the replevin statutes in *Fuentes*. These differences included the fact that (1) the application must allege

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[285] *See supra* notes 87-150 and accompanying text.
[286] 407 U.S. 67 (1972).
[287] *Id.* at 96-97.
[288] *Id.* at 97.
[289] 416 U.S. 600, 600-01 (1974).

" 'specific facts' shown by verified petition or affidavit" and not merely contain "bare, conclusory claims";[290] (2) the showing must be made to a judge, not merely a clerk;[291] (3) the issues governing the right to sequestration are limited to "the existence of a vendor's lien and the issue of default," as opposed to the issue of whether the property had been "wrongfully detained" as in the Florida and Pennsylvania statutes;[292] and (4) following sequestration Louisiana law provided for an "immediate hearing and dissolution of the writ unless the plaintiff proved the grounds upon which the writ was issued."[293] Because these differences were thought to "minimize the risk of error,"[294] *ex parte* seizure of the property was permitted despite the Due Process Clause.

Justice Stewart's dissenting opinion, joined by Justices Douglas and Marshall,[295] found the Louisiana statute "constitutionally indistinguishable" from those in *Fuentes*.[296] The requirement of a sworn affidavit or verified petition did not so much test the truth of the allegations as the "strength of the applicant's own belief in his rights."[297] The requirement that a judge issue the writ rather than a clerk was true only in the Orlean Parish and, in fact, had been accomplished by a statutory amendment applicable to this one parish which, according to the official comments, had been intended to make no change in the law.[298] Finally, Justice Stewart denied that there was any difference between a showing that the defendant was in wrongful possession and a showing that he was in default.[299]

In the view of the dissenters, the decision in *Mitchell* "unmistakably overruled"[300] *Fuentes*. Further, the "only perceivable change" that had occurred since *Fuentes* was decided two years earlier and that could explain the result in *Mitchell*, was in the

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[290] *Id.* at 616.

[291] *Id.* at 616-17.

[292] *Id.* at 617-18.

[293] *Id.* at 618 (citations omitted).

[294] *Mitchell*, 416 U.S. at 618.

[295] *Id.* at 629 (Stewart, J., dissenting). The only reference to Justice Brennan's view was a single sentence, at the close of the Stewart dissent, stating that "Mr. Justice Brennan is in agreement that *Fuentes v. Shevin* . . . requires reversal of the judgment of the Supreme Court of Louisiana." *Id.* at 636.

[296] *Id.* at 634.

[297] *Id.* at 632.

[298] *Id.* (citations omitted).

[299] *Mitchell*, 416 U.S. at 633.

[300] *Id.* at 635.

composition of the Court.[301]

The following year in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,[302] Justices White and Powell joined the liberals to strike down on a 7-2 vote a Georgia garnishment statute that authorized the garnishment of a bank account based on an *ex parte* application and the posting of a bond. Writing for the majority, Justice White explained that the Georgia statute had "none of the saving characteristics" of the Louisiana sequestration statute upheld in *Mitchell*,[303] and therefore, *Fuentes* required its invalidation. In a concurring opinion, Justice Stewart noted his gratification that he had been mistaken in concluding in *Mitchell* that *Mitchell* had overruled *Fuentes*.[304]

Justice Blackmun, joined by Justice Rehnquist, dissented, arguing that *Mitchell* had "substantially cut back"[305] *Fuentes*, and thus *Fuentes* could not be considered "as of much influence or precedent for the present case."[306] Justice Blackmun concluded that the Georgia statute provided all the protections the Due Process Clause required.[307]

Justice Powell concurred only in the judgment because he too believed that *North Georgia Finishing* "appear[ed] to resuscitate" *Fuentes*, which he thought had been "significantly narrowed"[308] by *Mitchell*. Although Justice Powell would not have required all of the safeguards present in *Mitchell*, he concurred in the result because he found the Georgia statute insufficient under even his weaker view of due process.[309]

While Justice White's opinions in *Mitchell* and *North Georgia Finishing* suggest that minor differences in the statutes controlled the results in all three cases, at least six justices, and perhaps seven justices, believed that *Mitchell* had overruled or sharply limited *Fuentes*.[310] Thus, what these cases really seem to represent is

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[301] *Id.*

[302] 419 U.S. 601 (1975).

[303] *Id.* at 607-09.

[304] *Id.* at 608.

[305] *Id.* at 615 (Blackmun, J., dissenting).

[306] *Id.* at 616.

[307] *North Georgia Finishing*, 419 U.S. at 619-20.

[308] *Id.* at 609 (Powell, J., concurring).

[309] *Id.* at 612-13.

[310] *See supra* note 300 and accompanying text. As noted in the text, Justice Stewart took the position in his *Mitchell* dissent, in which he was joined by Justices Douglas and Marshall, that *Mitchell* overruled *Fuentes*. *Mitchell*, 416 U.S. at 635. Justice Powell in his concurrence in *North Georgia Finishing* asserted that *Mitchell* "significantly narrowed"

a Court sharply divided into a liberal and conservative camp, with Justice White providing the swing vote.

While the fact of an ideological split is clear enough, it is the nature of the split that poses the paradox. As noted above, in each of these provisional remedies cases, it was the conservatives moving to weaken the protection of the Due Process Clause, with the liberals seeking to strengthen it—the reverse of the position taken by both wings of the Court in the personal jurisdiction cases.

B. The Paradox Resolved

The paradox is resolved by a closer look at the ideological underpinnings of these three decisions. Although both blocs on the Court changed positions as to the weight to be afforded the Due Process Clause, they did so in order to maintain consistency with another tenet of their respective ideologies: their belief that government power should or should not be subordinate to private will in the economic sphere.

Although the conservative ideology of the late nineteenth century had proposed a strong Due Process Clause to limit state regulation of the economy, it had not been uniformly opposed to state power. Rather, conservative ideology opposed the use of state power to redistribute wealth.[311] Indeed, in matters of public law, conservative ideology had favored an activist Court powerful enough to strike down regulatory legislation.[312]

In matters of private law, conservative ideology favored a Court that was merely facilitative of market arrangements—a Court that simply enforced private agreements without assessing their underlying fairness.[313] In either case, the preference was for a state that deferred to the existing distribution of wealth reached through the market.

Each of the three provisional measures cases involved a private party who was seeking to seize property as security for payment under some form of contractual arrangement. The conserva-

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Fuentes. North Georgia Finishing, 419 U.S. at 609. Justice Blackmun in his dissent in that same case, joined by Justice Rehnquist, thought *Mitchell* "substantially cut back" *Fuentes*. *Id.* at 615. Because Justice Brennan dissented in *Mitchell* on the ground that *Fuentes* required a different result, *Mitchell*, 416 U.S. at 636, he arguably constitutes a seventh vote for the view that *Mitchell* appeared to overrule *Fuentes*.

[311] *See supra* notes 4-19 and accompanying text.

[312] *See supra* notes 15-19 and accompanying text.

[313] *See supra* notes 6-15 and accompanying text.

tives were only too willing to engage the judicial machinery of the state on behalf of the party seeking to enforce the prior agreement; that is, to subordinate state power to private will and to facilitate a market-based arrangement.

Indeed, the conservatives saw the liberal effort to erect the Due Process Clause as a barrier to provisional remedies as simply another instance of inefficient government interference in the market. In his *Fuentes* dissent, Justice White noted that the requirement of a hearing imposed by the majority could be circumvented by rewriting the credit instrument to include a waiver of the hearing.[314] The principal effect of the *Fuentes* decision, he warned, would be simply to drive up the cost of securing credit, if not eliminating its availability to certain persons entirely.[315]

Mid-twentieth century liberal ideology, on the other hand, sought to weaken the Due Process Clause in order to permit the legislatures to regulate the economy.[316] Liberals objected to the exercise of state power in the provisional remedies cases, however, because state power in those cases was placed in the hands of a private party with little or no meaningful judicial supervision. Although the order to seize property may have the signature of a judge, as in *Mitchell*, in the absence of a prior adversarial hearing, the judge's regulatory oversight was of little value. Rather, the judge was doing little more than handing the power of the state over to the plaintiff. The liberals' objection was that state power had been subordinated to private will and used merely to ratify market-based arrangements.

The exercise of state power in the personal jurisdiction cases, by contrast, posed no problem for liberals because the state would redistribute wealth only after the plaintiff had met a burden of proof at trial. The personal jurisdiction cases, therefore, would not lead to the uncritical ratification of private claims.

The liberal ideology of the mid-twentieth century did not seek a strong state for its own sake. Indeed, outside the area of economic regulation, liberals generally opposed state power.[317] Liberals had supported a strong state principally in the economic sphere, where they believed it necessary to regulate the market.[318]

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[314] *Fuentes*, 407 U.S. at 102 (White, J., dissenting).
[315] *Id.* at 103.
[316] *See supra* notes 50-53 and accompanying text.
[317] *See supra* notes 54-60 and accompanying text.
[318] *See supra* notes 50-53 and accompanying text.

The split between liberals and conservatives also reflects an ideological disagreement over the private rights that are most deserving of protection. Mid-twentieth century liberal ideology was willing to defer to the state's regulation of economic activity, but believed that dignitary interests, such as privacy and expression, were entitled to strong protection against state intervention.[319] Late nineteenth century conservatives had been interested primarily in protecting property rights against state intervention, a position which they continue to maintain.[320] On the other hand, with respect to dignitary interests, conservatives have been much more tolerant of state regulation.

In the provisional remedies cases, the threat posed by state power was not to economic interests. In each case, to obtain a provisional remedy, the plaintiff had to post a bond. In the event that the prejudgment seizure ultimately was found unjustified, the bond was available to ensure that the injured defendant would be made whole.

The real injury threatened by state power was to the dignity of the defendant who, in the typical case, would be a consumer sued by a retailer.[321] The liberals sensed that there are some things money cannot buy. Damages simply would not be sufficient to compensate the defendant for "arbitrary taking."[322] The defendant's right to dignity can be protected only by preventing the wrongful encroachment by requiring a prior adversarial hearing. Consistent with mid-twentieth century liberal ideology, Justice Stewart and the liberal wing of the Court raised the Due Process Clause as a barrier to state infringement of this dignitary interest.

The conservatives, on the other hand, simply did not see the provisional remedies cases as anything but disputes over economic interests. If there was some kind of dignitary interest, it was of insufficient importance to enter into the calculus. For the conservatives, the typical case involved a plaintiff seeking to enforce a contractual right obtained through private bargaining. If the plaintiff was right, then the court should seize the goods. If the plaintiff

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[319] *See supra* notes 54-60 and accompanying text.

[320] *See supra* notes 15-19 and accompanying text.

[321] *See* Mitchell v. W.T. Grant Co., 416 U.S. 600, 601-02 (1974); Fuentes v. Shevin, 407 U.S. 67, 69-70 (1972) (cases involving seizure of personal possessions of private individuals). *But see* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 604 (1975) (garnishment of a corporate bank account).

[322] *See Fuentes*, 407 U.S. at 81-82.

was wrong, the bond requirement would ensure that the defendant was made whole. If the only interests truly deserving of protection were economic, then it was difficult to see why the provisional remedies statutes should not be upheld.

A recent provisional remedies case, *Connecticut v. Doehr*,[323] the first to be decided by the Court since *North Georgia Finishing*, suggests that there are limits even to the conservatives' willingness to hand state power over to private parties. This 1991 decision, by the now very conservative Supreme Court, unanimously struck down a Connecticut statute which authorized the prejudgment attachment of real property upon the filing of an affidavit showing that there was probable cause to sustain the claim.[324]

Justice White, writing for the Court as he had in *Mitchell* and *North Georgia Finishing*, explained that the Connecticut statute in *Doehr* differed from the Louisiana statute in *Mitchell* in two respects.[325] First, *Mitchell* had involved a vendor's lien in which the plaintiff's claim would have lent itself to documentary proof, while *Doehr* involved a prejudgment attachment in an assault action, which did not "readily lend [itself] to accurate *ex parte* assessments of the merits."[326] Second, the *Mitchell* statute had required that the plaintiff post a bond, while the *Doehr* statute did not.

The *Doehr* statute, in fact, provided fewer protections for the defendant than any of the statutes considered in the three other provisional remedies cases. Even the garnishment statute invalidated in *North Georgia Finishing* had required the posting of a bond in double the amount claimed due.[327] The *Doehr* statute thus was the easiest of the group to invalidate.

CONCLUSION

Both of the major lines of cases applying the Due Process Clause to civil procedure doctrine reflect ideological divisions on the Supreme Court that mirror ideological disagreements on substantive doctrine. These ideological disputes have both political and jurisprudential dimensions.

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[323] 111 S. Ct. 2105 (1991).

[324] *Id.* at 2161 (failure to provide pre-attachment hearing falls short of due process demands).

[325] *Id.* at 2114-15.

[326] *Id.* at 2115.

[327] *North Georgia Finishing*, 419 U.S. at 603.

The political dimension reflects a basic disagreement over the extent of state power. Conservative ideology with its preference for private, voluntary, market-based decision-making has sought to limit state regulatory power over defendants who have not intentionally subjected themselves to the power of the state. Thus, in the personal jurisdiction cases, conservatives have favored reading the Due Process Clause broadly so that it would permit states to exercise jurisdiction over only those defendants who have "purposefully" availed themselves of the laws of the forum state in a way which reflected a relatively strong degree of purposefulness. At the same time, in the provisional remedies cases, conservatives have been willing to read the Due Process Clause narrowly so that it would impose only the weakest limitations on state seizures of property to secure claims for breaches of contracts into which the defendants had voluntarily entered.

Liberal ideology, with its enthusiasm for state regulation of economic matters and distrust of the market, has read the Due Process Clause narrowly in the personal jurisdiction cases to permit states to exercise jurisdiction over defendants involved in economic disputes whenever it was reasonable in light of state regulatory interests. To the extent that a showing of purposeful availment was required, the liberals would have required only the most attenuated form of purposefulness. At the same time, liberals have read the Due Process Clause broadly in the provisional remedies cases to prevent state courts from blindly delegating state power to private plaintiffs seeking to enforce contractual remedies.

Thus, neither liberals nor conservatives have adhered consistently to either a broad or a narrow reading of the Due Process Clause, but have read it in different ways depending upon the setting. Where liberals and conservatives are consistent is in their approach to state regulation of private economic conduct—a realm in which their formulation of civil procedure doctrine under the Due Process Clause parallels closely their formulation of substantive doctrine in both public and private law.

The jurisprudential dimension reflects a basic disagreement over the form of judicial decision-making. Conservative ideology, with its preference for rule formalism, has attempted to formulate civil procedure doctrine, to the extent possible as a system of rigid rules, while liberal ideology, with its characteristic skepticism about rules, has preferred to construct doctrine utilizing flexible standards. The techniques preferred by liberals and conservatives

in formulating civil procedure doctrine under the Due Process Clause mirror those that they have used in constructing substantive legal doctrine.

Supreme Court decisions have shown and will continue to show that civil procedure is not a discrete body of doctrine insulated from the ideological clashes that dominate substantive law. Assumptions about freedom, equality, the role of the state, and the nature of adjudication that shape the evolution of substantive law also have shaped the development of civil procedure.